Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DONALD C. HAYHURST,
JANE DOE HAYHURST,

Petitioners,

v.

AMERICAN ASSOCIATION OF
NATUROPATHIC PHYSICIANS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARIANNE DUGAN
Counsel of Record
FACAROS & DUGAN
Attorneys for Both Petitioners
485 East 13th Avenue
Eugene, OR 97401
(541) 484-4004

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether the waiver rules regarding personal jurisdiction applied to motions filed pursuant to Fed. R. Civ. Proc. 12 also apply to a Rule 55 motion to set aside a default judgment.

Whether the decision of the Ninth Circuit Court of Appeals in this case conflicts with this Court's decision in *Haines v. Kerner*, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972), regarding the application of procedural rules to *pro se* litigants.

Whether the Ninth Circuit misapplied the law regarding the defendants' burden in setting aside a default judgment.

Whether, with regards to *Mrs.* Hayhurst, the decision of the Ninth Circuit Court of Appeals misapprehends the law regarding plaintiff's burden of proving personal jurisdiction.

PARTIES TO THE PROCEEDING

Petitioners are Donald C. Hayhurst; Patricia Hayhurst; and the American Academy of Naturopathic Physicians.

Respondent is the American Association of Naturopathic Physicians.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion is, to petitioners' knowledge, not yet reported, and is set forth in the Appendix at App. 1 through App. 12. The District Court's Order denying petitioners' motion to set aside the default judgment is not reported and is set forth in the Appendix at App. 13 through App. 14. The District Court's Order granting default judgment and permanent injunction is not reported and is set forth in the Appendix at App. 15 through App. 18.

STATEMENT OF JURISDICTION

The amended decision of the Ninth Circuit Court of Appeals was entered on November 1, 2000. App. 1-12. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution (due process/long-arm jurisdiction) as made applicable to the states by the Fourteenth Amendment; and Federal Rules of Civil Procedure 12(b), 55(c), and 60(b).

The Fifth Amendment states in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Civil Procedure 12(b) states in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (2) lack of jurisdiction over the person. . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Federal Rule of Civil Procedure 55(c) states in pertinent part: "For good cause shown the court may set aside

an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

Federal Rule of Civil Procedure 60(b) states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void.

STATEMENT OF THE CASE

Respondent/plaintiff is a Washington state corporation which sued petitioners/defendants, alleging that defendant Donald Hayhurst had infringed on its trademark. App. 19-32. The Hayhursts live in Nevada and have never been to Washington state. The allegedly infringing acts revolve around a website and mailings regarding a conference which were allegedly mailed to Washington state residents.

Plaintiff obtained a default judgment. App. 15-18. Defendants received a copy of the default judgment and immediately moved to set it aside, proceeding *pro se*. The defendants, not having benefit of counsel, labeled their filing with the court as a "Rule 12" motion. The court ordered a hearing in Washington. Mr. Hayhurst then submitted a filing that challenged personal jurisdiction based on long-arm requirements. App. 33-36. The plaintiff responded to that pleading, addressing the long-arm jurisdiction argument. App. 37-40. The district court held

the hearing and the magistrate recommended that the Hayhursts' motion to set aside the default be denied. The Hayhursts objected, and again raised long-arm jurisdiction. *See* App. 41-43. Plaintiff responded, addressing the long-arm jurisdiction argument. App. 44-47. The district court issued an order rejecting defendants' motion to set aside the default. App. 13-14.

The Hayhursts hired counsel and filed an appeal. On appeal, they argued, among other things, that plaintiffs had not alleged any facts demonstrating jurisdiction over Mrs. Hayhurst; that the court had no personal long-arm jurisdiction over them; and that the two allegedly offending flyers do not support jurisdiction.

On long-arm jurisdiction, petitioners noted that the website which Mr. Hayhurst's organization had maintained was non-interactive, and that under the reasoning of *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997), the website could therefore not provide the court with long-arm jurisdiction and the suit could therefore not withstand due process scrutiny under the Fifth and Fourteenth Amendments to the U.S. Constitution.

As for the mailings, which are set forth at App. 31 and App. 32, the defendants argued on appeal that they do not support jurisdiction in this trademark infringement action. The flyer at App. 31 is from the American Naturopathic Medical Association and does not mention plaintiff AANP or any similar name in any way. The flyer at App. 32 is from "American Association for Advanced Alternative Medicine," and the only mention of AANP is: "Others participating in this convention are American

Academy of Naturopathic Physicians (AANP)." Defendants argued that neither flyer provided long-arm jurisdiction because they did not in any way infringe on plaintiff's trademark.

Plaintiff argued that defendants had waived their right to raise long-arm jurisdiction, because their first *pro se* filing with the district court did not mention that defense. Defendants noted that they had raised long-arm jurisdiction in their second filing, and that both parties had fully briefed the issue before the district court made its decision.

The Ninth Circuit did not reach the long-arm jurisdiction issue, because it held that the appellants had waived personal jurisdiction by failing to include it in their first filing with the district court. App. 5-8.

As for defendants' argument that the complaint did not state a claim against Mrs. Hayhurst, the court addressed this in a footnote, stating merely that Mrs. Hayhurst was "in precisely the same position as her husband with regard to the issues on appeal." App. 4.

Although the Ninth Circuit's decisions that the appellants had waived personal jurisdiction and that appellants were served were sufficient to settle the issues on appeal, the Ninth Circuit went on to hold that the Hayhursts did not meet the test for setting aside a default judgment. App. 9-11.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Conflicts with Decisions of the Supreme Court and with Prior Decisions of the Ninth Circuit

With regards to the long-arm jurisdiction waiver question, the decision of the Ninth Circuit conflicts with this Court's decision in *Haines v. Kerner*, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972), and the Ninth Circuit's decision in *Cripps v. Life Insurance Co.*, 980 F.2d 1261 (9th Cir. 1992), regarding the application of procedural rules to *pro se* litigants.

In addition, the decision is unprecedented in applying the waiver rule of Fed. R. Civ. Proc. 12(b) to motions to set aside a default judgment pursuant to Fed. R. Civ. Proc. 55(c) and 60(b).

With regards to the issue of Mrs. Hayhurst, the decision of the Ninth Circuit conflicts with Ninth Circuit precedent with regards to plaintiff's burden of proving personal jurisdiction and the "void" nature of judgments when the court lacks jurisdiction.

The Ninth Circuit also misapplied the law, including precedents of the Ninth Circuit, regarding the test for setting aside default.

A. The Ninth Circuit's Decision That the *Pro Se* Defendants Waived Their Right to Challenge Personal Long-Arm Jurisdiction Conflicts with Supreme Court and Ninth Circuit Precedent

The Ninth Circuit held that defendants waived their right to challenge personal jurisdiction. Defendants

raised the issue of long-arm jurisdiction in their second rather than in their first filing with the district court. The Ninth Circuit held that, although defendants were not represented by counsel until their appeal was filed, this defect could not be overlooked. The Ninth Circuit stated: "a pro se litigant is not excused from knowing the most basic pleading requirements." App. 7.

Personal jurisdiction, and waiver thereof, is not a "basic pleading requirement." It is a complex area of law. Furthermore, the defendants *did* raise the issue before the district court prior to the court's denial of defendants' motion to set aside the verdict, and plaintiff had an opportunity to respond; thus neither the court system nor the plaintiff can show any sort of prejudice to their interests, which certainly must be the purpose of the waiver rule. App. 33-40.

Assuming *arguendo* that appellants were required to raise personal jurisdiction in their first filing with the court, the Ninth Circuit's decision conflicts with Supreme Court and Ninth Circuit precedent in *Cripps v. Life Insurance Co.*, 980 F.2d 1261 (9th Cir. 1992), and *Haines v. Kerner*, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972).

In *Cripps*, the Ninth Circuit held that the default judgment in a counterclaim against the plaintiff was "legally insupportable" and therefore vacated the judgment and remanded. The plaintiff had prepared an answer and mailed it to the district court for filing but, because she failed to comply with a number of local procedural rules, her answer was not filed. The district court did not return the answer to the plaintiff, or otherwise notify her that it had not accepted her papers. The

district court judge stated that "the Court is under no obligation to keep the filing party abreast of the status of her putative filing," and found it "simply inexcusable" that the plaintiff had failed to verify that her answer had been filed. The Ninth Circuit rejected that analysis, however, noting:

> As a general proposition, the district court's statement is correct. The Supreme Court, however, has made it clear that pleadings of pro se litigants are to be held to less rigorous standards than those drafted by attorneys. *Haines v. Kerner*, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972) (per curiam). Susan Cripps is a pro se litigant. Susan's answer was not filed because the caption and format of the pleading did not conform with local rules. While it is true that the court is generally under no obligation to notify a litigant of the status of her pleading, to enter a judgment of default against a pro se litigant such as Susan for essentially a mistake of form strikes us as an unjust and excessive sanction. . . .
>
> . . . . [I]t appears that Susan never was advised of the problems with her pleadings. Even assuming some sanction was appropriate, less drastic sanctions than a default judgment were clearly available to the district court. *See United States for Use of Wiltec Guam, Inc. v. Kahaluu Constr. Co.*, 857 F.2d 600, 604 (9th Cir. 1988); *Malone v. United States Postal Service*, 833 F.2d 128, 131 (9th Cir. 1987), *cert. denied*, 488 U.S. 819 (1988).

980 F.2d at 1268. The same equities apply in this case. The requirement that lack of personal jurisdiction be raised in the first filing with the court is not something a *pro se*

defendant can be expected to know. There was no prejudice to plaintiff, and less drastic sanctions than a default judgment were clearly available to the district court. *Pleadings* of pro se litigants are to be held to less rigorous standards than those drafted by attorneys. *Haines*, 404 U.S. at 520.

It is *plaintiff's* burden to prove that the court has personal jurisdiction. *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 850 (9th Cir. 1993). A default judgment wherein the court lacks personal jurisdiction is *void*, and when lack of jurisdiction is demonstrated, "the court must act accordingly." *Thos. P. Gonzalez Corp. v. Consejo Nacional*, 614 F.2d 1247, 1256 (9th Cir. 1980).

Given the allocation of the burden to plaintiff, the lack of any prejudice to plaintiff, and the fact that the judgment is *void* if defendants are correct in their long-arm arguments, the Ninth Circuit's decision is truly extraordinary in denying *pro se* defendants the right to demand that plaintiff meet its burden.

It appears that in fact the Ninth Circuit discounted entirely the fact that the Hayhursts were proceeding *pro se* in the district court, because the Ninth Circuit opined that "Hayhurst is obviously well aware of the difference between" the defense of lack of service and the defense of lack of long-arm jurisdiction, "as he distinguishes them in his appeal briefs." App. 7. This is a *non sequitur*. Certainly, the Hayhursts' *counsel* on appeal was aware of the difference between the two defenses. But it makes no sense to assign that knowledge to the Hayhursts at the time they were proceeding *pro se*. It appears that the Ninth Circuit either did not believe that the Hayhursts

were unrepresented below, or believed that a *pro se* party who later hires an attorney thereby loses the right to argue for leniency in applying the procedural rules at the *pro se* stage. There is no factual support for the former assumption; and the latter proposition would be inequitable in punishing *pro se* litigants who are wise enough to finally hire an attorney.

Given the precedential impact of this opinion on other *pro se* litigants, Petitioners urge the Court to grant certiorari.

B. The Ninth Circuit's Decision That Defendants Were Required to Raise Long-Arm Jurisdiction in Their First Filing with the Court is a Misapprehension of the Rules of Procedure and of Supreme Court Precedent

The Ninth Circuit held that defendants waived the issue of personal long-arm jurisdiction because they did not raise it in their first document submitted to the Court. In doing so, the Ninth Circuit characterized defendants' first court filing as a Rule 12 motion. App. 6. But it was not a Rule 12 motion; it was by necessity a Rule 55 motion, because the default judgment had been entered.

The Ninth Circuit's decision involves questions of exceptional importance, because the Ninth Circuit made the sweeping, precedential decision to apply the waiver rules regarding Fed. R. Civ. Proc. 12 to *post-judgment* proceedings to set aside a default judgment – something that it appears only the Seventh Circuit has done to date. *O'Brien v. O'Brien & Associates, Inc.*, 998 F.2d 1394, 1399 (7th Cir. 1993).

The Ninth Circuit stated "That Hayhurst's first filing was not dubbed a 'Rule 12' motion was of no significance. The rule applies with equal effect no matter what the title of the hearing. Hayhurst's Rule 55 motion was also a Rule 12 motion in that he raised a rule 12 objection in it." App. 6. But this is a misapprehension of the Rules of Procedure. Fed. R. Civ. Proc. 12 applies, by its explicit terms, only to pre-judgment proceedings. That Rule requires that a defendant set forth their defenses "in the responsive pleading" or "by motion" made "before pleading." Fed. R. Civ. Proc. 12(b). The responsive pleading (or Rule 12(b) motion) must be filed "within 20 days after being served with the summons and complaint." Fed. R. Civ. Proc. 12(a)(1)(A). Reading these two provisions of Rule 12 together, it is clear that, by its own terms, a Rule 12(b) motion *must be* submitted within 20 days after service. It is therefore nonsensical to apply the provisions of Rule 12 to a post-judgment motion to set aside default. Taking the Ninth Circuit's decision to its logical conclusion, a person seeking to set aside a default would be precluded from raising *any* defenses, because it would be too late under Rule 12 to do so.

The distinction is important and the Ninth Circuit's holding that the Rule 12 waiver rules apply to Rule 55 motions conflicts with Supreme Court precedent. As noted above, a default judgment wherein the court lacks personal jurisdiction is void. In *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 51 S. Ct. 517 (1931), this Court reiterated the principle set forth in *Pennoyer v. Neff*, 95 U.S. 714 (1877), that a defendant who makes no appearance prior to default remains free to challenge the default for want of personal jurisdiction. If Rule 12

applied to appearances after default, this Court would not have been able to so hold, because Rule 12 requires such a defense to be raised within twenty days of service of the complaint.

The Federal Rules do not set forth a procedure or timing for a post-judgment challenge to jurisdiction. In fact, this Court made clear in *Pennoyer* that a defaulted defendant is even free to raise the personal jurisdiction defense in the context of a separate lawsuit, and that a default judgment issued by a court without personal jurisdiction over the defendant is *void*. As this Court noted in *Burnham v. Superior Court California*:

> The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books . . . American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted. . . . In *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878), we announced that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment as well.

495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990) (citations omitted).

Thus this Court held in *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), "A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere." *See also Brown v. Fletcher's Estate*, 210 U.S. 82, 52 L. Ed. 966, 28 S. Ct. 702 (1908) ("If [the court] has no jurisdiction, any judgment rendered by it is absolutely void, and may be attacked in a collateral proceeding.").

For the Ninth Circuit to place stringent time limits on when a defaulted defendant – especially a *pro se* defendant – can challenge the judgment as void undermines this basic principle of due process. The Ninth Circuit's decision is especially remarkable given the fact that the plaintiff could not show any prejudice, as the long-arm issue was fully briefed before the court ruled on the motion to set aside.

The Ninth Circuit has set a precedent in which it applies the waiver rules of Fed. R. Civ. Proc. 12 to a motion to set aside default. That precedent conflicts with *Baldwin* and *Pennoyer*. It also conflicts with the fact that it is plaintiff's burden to prove personal jurisdiction and that a default judgment based on lack of personal jurisdiction is void. This Court should grant certiorari.

C. The Ninth Circuit Misapprehended the Law (Including Precedents of the Ninth Circuit) Regarding Defendants' Burden in Setting Aside a Default

Although the Ninth Circuit's decisions that the appellants had waived personal jurisdiction and that appellants were served were sufficient to settle the issues on appeal, the Ninth Circuit went on to hold that the Hayhursts did not meet the test for setting aside a default judgment. App. 9-11. In doing so, the Ninth Circuit misapplied the standard for setting aside default.

The Ninth Circuit stated that the appellants were required to show a meritorious defense, lack of prejudice to plaintiff, and lack of culpable conduct in order to set aside the default judgment. App. 10. In doing so, the

Ninth Circuit ignored the precedents which hold that this test does not apply where defendants are arguing that the default judgment was void for lack of jurisdiction. *Thos. P. Gonzalez Corp. v. Consejo Nacional*, 614 F.2d 1247, 1256 (9th Cir. 1980) (where personal jurisdiction is at issue, defendant need not demonstrate that he has a meritorious defense). As the Ninth Circuit noted in *Gonzalez*, "[e]ither a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly." 614 F.2d at 1256. Because the judgment is void, defendants need do nothing besides prove that the court lacked jurisdiction. The Court should grant certiorari.

Even if the three-part test does apply, the Ninth Circuit was incorrect in finding that defendants did not present a meritorious defense. App. 10. Defendants did raise arguments below regarding the merits of their defense. App. 35 (alleging that trademark does not belong to plaintiff and that plaintiff is not a valid corporation). The Ninth Circuit appears to have ignored this, and this is an additional reason the Court should grant certiorari.

D. With Regards to *Mrs.* Hayhurst, the Decision Conflicted with Ninth Circuit Precedent

The Ninth Circuit failed to address the plight of *Mrs.* Hayhurst separately from her husband. App. 4. Plaintiffs did not meet their *initial* burden of alleging facts to show that the court had personal jurisdiction over Mrs. Hayhurst. The burden should therefore never have shifted to

Mrs. Hayhurst to argue that the court did *not* have personal jurisdiction over her.

The complaint did not identify Mrs. Hayhurst as a participant in the business entities alleged to have committed the infringing acts. *See* App. 22-25 ¶¶ 10-14, 17, 18. Although plaintiff asserted in the venue section of the complaint that "[e]ach of the defendants have conducted activities in interstate commerce" by maintaining a website and mailing flyers, the remainder of the complaint, which explains the specifics of these alleged acts, mentions only Mr. Hayhurst and the corporate defendant and does not allege that Mrs. Hayhurst is involved in any of the allegedly infringing entities and their activities. *See* App. 20 ¶ 5. Plaintiff asserts only that Mrs. Hayhurst is Mr. Hayhurst's wife. App. 19 ¶ 2.

The plaintiff has the burden of proving the court has personal jurisdiction over the defendant. *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 850 (9th Cir. 1993); *Kransco Mfg. v. Markwitz*, 656 F.2d 1376, 1378 (9th Cir. 1981). "A plaintiff seeking to subject a nonresident defendant to jurisdiction of the court must do more than allege facts that show a possibility of jurisdiction." *Jet Charter Service, Inc. v. Koeck*, 907 F.2d 1110, 1112 (11th Cir. 1990), *cert. denied*, 499 U.S. 937, 111 S. Ct. 1390 (1991). A default judgment wherein the court lacks personal jurisdiction is *void* (not voidable). *Thos. P. Gonzalez Corp. v. Consejo Nacional*, 614 F.2d 1247, 1256 (9th Cir. 1980). As the Ninth Circuit noted in *Gonzalez*, "[e]ither a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly." 614 F.2d at 1256.

If there is no long-arm jurisdiction over someone whose only connection with the forum is as a corporate officer (*see Kransco Mfg. v. Markwitz*, 656 F.2d 1376, 1379 (9th Cir. 1981)), certainly there can be no long-arm jurisdiction over a defendant's wife merely because she is his wife.

II. The Questions Presented Are Important

The Ninth Circuit issued the sweeping, precedential holding that a Rule 55 motion to set aside a default judgment "was also a Rule 12 motion." App. 6. The Ninth Circuit therefore applied the strict waiver rules regarding Fed. R. Civ. Proc. 12 to defendants' *post-judgment* proceeding to set aside default judgment – something that it appears only the Seventh Circuit has done, in *O'Brien v. O'Brien & Associates, Inc.*, 998 F.2d 1394 (7th Cir. 1993). That almost unprecedented decision conflicts with Supreme Court precedent, as further explained in this petition. It is an important question because it implicates every one of the many motions to set aside judgment that are filed each year. It is also important because it undermines the 124-year-old, foundational rule of *Pennoyer v. Neff* establishing that a judgment issued without personal jurisdiction is void and can be attacked as such *at any time*.

The questions presented are also important because the Ninth Circuit chose to strictly apply the confusing and unclear rules regarding waiver and post-judgment procedure to *pro se* litigants – even though the long-arm jurisdiction issue was fully briefed before the district court made its decision. Strict application of procedural

rules to *pro se* litigants where the opposing party has not been prejudiced goes against the practice of this Court and the Ninth Circuit to allow some leniency in application of procedural rules to *pro se* litigants.

The issue regarding Mrs. Hayhurst is important because if the Ninth Circuit decision is not overturned, it will encourage plaintiffs in any type of litigation to name spouses without even alleging any connection between the spouse and the alleged offending actions.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARIANNE DUGAN
Counsel of Record
FACAROS & DUGAN
Attorneys for Both Petitioners
485 East 13th Avenue
Eugene, OR 97401
(541) 484-4004

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, *Plaintiff-Appellee,* v. DONALD C. HAYHURST; JANE DOE HAYHURST, *Defendants-Appellants.*	No. 99-35823 D.C. No. CV-98-01055-JCC ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, Chief Judge, Presiding

Argued and Submitted
August 10, 2000 – San Francisco, California

Filed September 18, 2000
Amended November 1, 2000

Before: Arthur L. Alarcon, Diarmuid F. O'Scannlain, and Ronald M. Gould, Circuit Judges.

Opinion by Judge O'Scannlain

COUNSEL

Marianne Dugan, Facaros, Dugan, Rosas, Eugene, Oregon, for the appellants.

Lawrence D. Graham, Black, Lowe & Graham, Seattle, Washington, for the appellee.

ORDER

The opinion filed September 18, 2000, is hereby ordered amended as follows:

Slip Op. at 12080: In the first sentence of the third paragraph, after the word "Hayhurst" insert a footnote that reads:

> "The Association also sued Hayhurst's wife, Patricia Hayhurst, who appeals the default judgment jointly with her husband. Mrs. Hayhurst is in precisely the same position as her husband with regard to the issues on appeal."

With this amendment, the panel has voted unanimously to deny the petition for rehearing. Judges O'Scannlain and Gould have voted to deny the petition for rehearing en banc. Judge Alarcon recommended that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide, among other issues of civil procedure, whether a party who raises only one defense in a motion to vacate default judgment thereby waives all other defenses.

I

This appeal is the latest round of antipathy in an ongoing feud between Nevada resident Donald Hayhurst and the American Association of Naturopathic Physicians ("Association"). The Association is a non-profit organization that acts as an advocate for naturopathic physicians nationwide. Hayhurst has a long history of creating and controlling groups with names or acronyms curiously similar to the Association. At the center of this case is an entity Hayhurst operated called the American *Academy* of Naturopathic Physicians. This Academy's acronym, like the Association's, is AANP, and Hayhurst referred to it as such in mailings and other promotional literature. More importantly, Hayhurst acquired the domain name <www.aanp.com>. Using that domain name, Hayhurst subsequently constructed a web site that referred repeatedly to the Academy as the "AANP."

On July 29, 1998, the Association sued Hayhurst[1] in the United States District Court for the Western District of Washington for unfair competition, trademark infringement, service mark infringement, and trade name infringement. The Association dispatched a process server to 8170 Creek Water Lane in Las Vegas, Nevada. Hayhurst did not respond to the summons and complaint nor to the Association's motion for a default judgment, and on January 7, 1999, the district court entered a default judgment against him accordingly. On January 26, 1999, Hayhurst filed a motion under Fed. R. Civ. P. 60 to have the default judgment vacated and set aside. The district court referred the matter to a magistrate judge who held an evidentiary hearing to determine the facts underlying the service of process. After weighing the credibility of the parties, the magistrate judge found unambiguously for the Association, recommending that Hayhurst's motion to vacate and to set aside the default judgment be denied and that his motion to dismiss also be denied. Chief Judge Coughenour agreed and adopted the magistrate judge's recommendation in toto. Hayhurst filed this timely appeal.

II

Hayhurst first argues that the district court could not exercise personal jurisdiction over him. A fundamental tenet of the Federal Rules of Civil Procedure is that

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[1] The Association also sued Hayhurst's wife, Patricia Hayhurst, who appeals the default judgment jointly with her husband. Mrs. Hayhurst is in precisely the same position as her husband with regard to the issues on appeal.

certain defenses under Fed. R. Civ. P. 12 must be raised at the first available opportunity or, if they are not, they are forever waived. *See* Fed. R. Civ. P. 12(g), (h). Rule 12(h) provides that a "defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading. . . . " *Id.* Rule 12(g) states that "[i]f a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted. . . . " *Id.*

Upon learning of the default judgment against him in this case, Hayhurst on January 26, 1999, filed pro se a motion to vacate and to set aside the default judgment under Fed. R. Civ. P. 55(c). In this pleading, Hayhurst asserted the defense of improper service under Rule 12(b)(5), but did not assert the defense of lack of personal jurisdiction under Rule 12(b)(2). The Association argues that Hayhurst's motion counts as his first responsive pleading for the purposes of waiver under Rule 12. Hayhurst argues that his motion does not count for the purposes of waiver because it was filed under Rule 55 and not Rule 12. We are not persuaded by Hayhurst's interpretation.

The essence of Rule 12 – embodied in the combined language of 12(g) and 12(h) – is that a party "who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses [personal jurisdiction, improper venue, insufficient process, or insufficient service] he then has and thus allow the court

to do a reasonably complete job." Fed. R. Civ. P. 12 advisory committee's note, 1966 Amendment, subdivision (h). Thus, if Hayhurst raised *any* Rule 12 defenses in his first filing to the court, he was obliged to raise *all* of those specified in Rule 12(h).

The fact that Hayhurst's first filing was not dubbed a "Rule 12" motion is of no significance. The rule applies with equal effect no matter what is the title of the pleading. Indeed, in *O'Brien v. O'Brien & Associates, Inc.*, 998 F.2d 1394, 1399 (7th Cir. 1993), the Seventh Circuit held that a party had waived their defense of personal jurisdiction by not raising it in their Rule 55 motion, which was also the first filing to the court. There, the court explicitly found that the motion made pursuant to Rule 55 "was, in essence, a Rule 12 motion. . . . " *Id.* When a party does not respond to a complaint and default judgment is entered, a Rule 55 motion will very frequently be the first document filed with the court. Hayhurst's Rule 55 motion was also a "Rule 12" motion in that he raised a Rule 12 objection in it, asserting insufficiency of service of process under Rule 12(b)(5).

Hayhurst accurately points out that a defendant remains free to challenge personal jurisdiction after a default judgment has been entered. That is a general principle that remains true until the defendant affirmatively waives his objection, as Hayhurst did here. Hayhurst's invocation of this point is inapposite because, although he certainly did have the right to object to personal jurisdiction after the default judgment was entered against him, he then squandered that opportunity by failing to raise it.

Hayhurst also argues that he did raise personal jurisdiction in his first filing with the court because he argued in his Rule 55 motion that he "had not been properly served." This confuses two separate defenses under Rule 12(b). An objection based on insufficiency of service of process is delineated under Rule 12(b)(5); one based on "lack of jurisdiction over the person" is set forth under Rule 12(b)(2). Hayhurst is obviously well aware of the difference between these two defenses, as he distinguishes them in his appeal briefs.

Finally, Hayhurst invokes the equities of the situation, pointing out that his initial filing was made pro se and arguing that the requirements of Rule 12 are "not something a pro se defendant can be expected to know." As for the equities in this case, Hayhurst is on thin ice: despite receiving three notices concerning the status of this matter, he resolutely ignored the court and the Association until a judgment had been filed against him; then, when he did appear, he made protestations of innocence that were found to be wholly untrue by the district court. Even ignoring this behavior, however, a pro se litigant is not excused from knowing the most basic pleading requirements. *See, e.g., Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 382 (9th Cir. 1997) (acknowledging the rule that "pro se litigants are not excused from following court rules").

Hayhurst concludes his attempts to stave off his waiver of this issue by asserting that the "rule has never been held to extend to the timing of post-default pleadings." But, that is precisely what happened in *O'Brien*, 998 F.2d at 1399. The evidence is quite clear that Hayhurst's first responsive pleading to the district court

raised one Rule 12 defense but did not object to personal jurisdiction. Thus, we conclude that he has waived his ability to challenge jurisdiction now. Therefore, we need not decide the merits of Hayhurst's personal jurisdiction argument.

III

Hayhurst also adamantly, though not very convincingly, maintains that he was never served with the summons and complaint in this case. He has, however, already had his opportunity to present his side of the case to the district court, which emphatically found that his version of events was not credible.

Hayhurst contends that the address at which the Association attempted to serve him does not belong to him but instead to his daughter. He also argues that the description of him proffered by the Association's process server describes someone "grossly different" than him. The district court disagreed. Instead, it found that Hayhurst did live at the Creek Water Lane address because, in a document filed with the court, Hayhurst acknowledged as much. In that document, Defendants' Objection to Plaintiff's Opposition to Motion to Vacate & Set Aside Default Judgment, Hayhurst responded to the process server's claim that he knocked on Hayhurst's door at the Creek Water Lane address not by pointing out that this is not his address, but instead by arguing that one cannot knock on the front door because there is a security gate in the way. To settle conclusively the point that Hayhurst

lived at the Creek Water address, the Association produced an invoice in Hayhurst's name for that security gate.

As for the alleged inaccuracies in the process server's description of Hayhurst, the district court had no way of evaluating that claim since Hayhurst refused to appear before the magistrate judge. He did describe himself to the court and sent along some photographs, but, again, the court had no means of verifying the accuracy of either. This situation is a classic instance of competing testimony, and it is well established that the "district court is in the best position to determine the veracity of a witness's statements." *United States v. Little*, 753 F.2d 1420, 1445 (9th Cir. 1985). In resolving this factual dispute in favor of the Association, the district court did not clearly err – Hayhurst was served with the complaint and summons.

IV

Hayhurst's third argument is that the district court erred by refusing to set aside the default judgment. Once judgment by default has been entered against a party under Rule 55(b), the judgment may be set aside for "mistake, inadvertence, surprise, or excusable neglect, or fraud, misrepresentation or other misconduct of an adverse party." *Cassidy v. Tenorio*, 856 F.2d 1412, 1415 (9th Cir. 1988) (internal quotation marks and ellipses omitted). The Ninth Circuit has stated that a district court may deny a motion to vacate a default judgment if:

> (1) the plaintiff would be prejudiced if the judgment is set aside, (2) defendant has no meritorious defense, or (3) the defendant's culpable conduct led to the default.

In re Hammer, 940 F.2d 524, 525-26 (9th Cir. 1991). The court in *Hammer* further stated explicitly that "[t]his tripartite test is disjunctive," meaning that the district court would be free to deny the motion if any of the three factors was true. *Id.* at 526.

The district court held that "Defendants fail on all three legs of the test." Certainly, that appears to be true as to the second and third prongs of the *Hammer* test.[2] With regard to the second prong, because Hayhurst has waived his jurisdictional objection, cannot credibly claim insufficient service of process, and has raised no other defenses to the Association's claims of trademark infringement, he has no "meritorious defense" to those claims.

With regard to the third prong, Hayhurst himself was purely the cause of the default. He repeatedly attempted to avoid the Association's attempts to provide him with documents pertaining to the lawsuit. The court in *Hammer* made clear that "the trial court's denial of a motion to vacate a default judgment will be affirmed if the defendant's own culpable conduct prompted the default." 940

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[2] The district court appears to suggest that the Association would be prejudiced – in satisfaction of the first *Hammer* prong – because "they have duly sought resolution of the dispute . . . and have played by the rules." Absent a showing of some evidentiary or financial loss, however, the Association is unlikely to prove prejudice. Nonetheless, the Association can prevail by satisfying the second or third prong of the *Hammer* test.

F.2d at 526. That is precisely the situation in this appeal, and the district court did not abuse its discretion in so ruling. Thus, we uphold the denial of Hayhurst's motion to vacate and set aside the default judgment.

V

After Hayhurst filed his appeal in this case, the district court ordered him to post a $30,000 supersedeas bond to cover costs on appeal as well as to secure the judgment of $11,900 assessed against him. Hayhurst argues that this bond was excessive.

Hayhurst's sole argument is that the court's order "is unsupported and should be reversed" because it is far greater than the $1000 bond requested by the Association to cover costs on appeal. This argument ignores, however, the fact that the district court filed a subsequent order – after the appeal briefs had been filed – clarifying that the bond was "to cover costs on appeal *and the money judgment.*" Given these dual justifications, there does not appear to be anything unreasonable about the amount of the bond. *See Montserrat Overseas Holdings, S.A. v. Larsen*, 709 F.2d 22, 24-25 (9th Cir. 1983). Certainly, the district court did not abuse its discretion in requiring it.

VI

The district court awarded the Association $4,354.25 in attorneys' fees and Hayhurst objects to this award because, he argues, this case was not "exceptional," as required by the statute. *See* 15 U.S.C. § 1117(a). In *Molloy v. Wilson*, 878 F.2d 313, 315 (9th Cir. 1989), however, we

held that "[a]n appeal from a denial of a Rule 60(b) motion brings up only the denial of the motion for review, not the merits of the underlying judgment." In this case, an inquiry into whether Hayhurst's Lanham Act violations were "exceptional" would require an analysis of the merits of the Association's claims, and, according to *Molloy*, the merits of these claims are not before us on this appeal. Thus, Hayhurst's attack on the propriety of attorneys' fees in this case is not properly before this court on appeal and we do not address it.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, Plaintiffs, v. DONALD C. HAYHURST; JANE DOE HAYHURST, and AMERICAN ACADEMY OF NATUROPATHIC PHYSICIANS, Defendants.	No. C98-1055C ORDER (Filed Jul 16, 1999)

The Court, having reviewed Plaintiffs' complaint, Defendants' motion to vacate and set aside default judgment Rule 55(c) and motion to dismiss, the Report and Recommendation of the Honorable David E. Wilson, United States Magistrate Judge, and the remaining record, does hereby find and ORDER:

1. The Court adopts the Report and Recommendation;

2. Defendants' motion to vacate and set aside default judgment Rule 55(c) and motion to dismiss are DENIED;

3. The Clerk is directed to send a copy of this Order to all parties of record and to Judge Wilson.

DATED this 16 day of July, 1999.

/s/ John C. Coughenour
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, Plaintiff, v. DONALD C. HAYHURST, d/b/a aanp.com and aannp.com; JANE DOE HAYHURST, and AMERICAN ACADEMY OF NATUROPATHIC PHYSICIANS, Defendants.	Civil Action No. C98-1055C PERMANENT INJUNCTION AND ORDER ON DEFAULT JUDGMENT [PROPOSED] (Filed Jan. 7, 1999)

This matter having come before the Court upon Plaintiff American Association of Naturopathic Physicians' ("AANP") motion for default judgment, the Court having considered all materials submitted in support of that motion and all other papers on filed in this action, and the Clerk of this Court having properly entered the default of each of the Defendants, including Donald C. Hayhurst, doing business as *aanp.com* and *aannp.com*; his wife, Jane Doe Hayhurst; and the American Academy of Naturopathic Physicians, for failure to answer or otherwise defend in this action the Court hereby ORDERS as follows.

Monetary Relief

1. Defendants shall pay to Plaintiff the amount of $11,900 for its actual and enhanced damages.

2. As an exceptional case, Defendants shall also pay to Plaintiff its attorneys' fees in the amount of $4,354.25 and $482.98 for its costs.

Permanent Injunction

In addition, the Court hereby permanently enjoins each of the Defendants from:

1. Using the names "American Association of Naturopathic Physicians," "American Academy of Naturopathic Physicians," "AANP" or any derivative, colorable imitation, or confusingly similar names;

2. Filing applications to register the names "American Association of Naturopathic Physicians," "American Academy of Naturopathic Physicians," "AANP" or any derivative, colorable imitation, or confusingly similar names as corporate names, trade names, trademarks, or service marks with any governmental agency;

3. Using the Internet domain name *aanp.com*, or any domain name that is a derivative of, colorable imitation of, or is confusingly similar to the names "American Association of Naturopathic Physicians," "American Academy of Naturopathic Physicians," or "AANP";

4. Filling applications to register any domain name in any country that is a derivative of, colorable imitation of, or is confusingly similar to, in whole or in part, the

names "American Association of Naturopathic Physicians," "American Academy of Naturopathic Physicians," or "AANP".

Corrective Actions

The Court further Orders the following corrective actions:

1. All Defendants to deliver to Plaintiff for destruction all correspondence, stationery, advertisements, brochures, or other materials in the possession of Defendants and their agents, servants, employees, successors, and assigns that bear the names "American Association of Naturopathic Physicians," "American Academy of Naturopathic Physicians," or "AANP" or any derivative, colorable imitation, or confusingly similar names;

2. Defendant Academy to change its name to a name other then "American Association of Naturopathic Physicians," "American Academy of Naturopathic Physicians," or "AANP" or any derivative, colorable imitation, or confusingly similar names;

3. Any and all Defendants to transfer ownership in the domain name *aanp.com* to Plaintiff; Defendants shall also remove all content from that web site within five days of this Order;

4. All Defendants to send a written notice to all recipients of any of their mailings bearing the marks "AANP" or "American Academy of Naturopathic Physicians," and to all persons who have viewed Defendants' Internet site, setting forth Plaintiff's

exclusive ownership of and rights to its trademarks and trade names informing the recipients of this Order, and disavowing any relationship between Plaintiff and Defendants; and

5. All Defendants to file with this Court and serve on AANP a report in writing setting forth in detail the manner and form in which Defendants have complied with the terms of this Order. Such report shall be filed and served not later than 30 days of the date of this order. [~~Failure to comply with this Order shall be viewed as contempt of the Court's Order and shall, upon AANP's motion, entitle AANP to sanctions in the amount of $100 per day in violation, plus attorneys' fees and costs.~~ /s/ JCC]

/s/ John C. Coughenour
United States District Judge

Presented by:

CHRISTENSEN O'CONNOR
JOHNSON & KINDNESS PLLC

/s/ Lawrence D. Graham
James R. Uhlir, WSBA No. 2,365
Lawrence D. Graham, WSBA No. 25,402
Attorneys for Plaintiff American Association of Naturopathic Physicians

ORIGINAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, Plaintiff, v. DONALD C. HAYHURST; JANE DOE HAYHURST, and AMERICAN ACADEMY OF NATUROPATHIC PHYSICIANS, Defendants.	Civil Action No. **C98-1055** **COMPLAINT FOR UNFAIR COMPETITION, TRADEMARK INFRINGEMENT, SERVICE MARK INFRINGEMENT, AND TRADE NAME INFRINGEMENT** (Filed Jul 29, 1998)

I. Parties

1. Plaintiff American Association of Naturopathic Physicians ("AANP") is a non-profit Oregon corporation having a principal place of business in Seattle, Washington.

2. Defendants Donald C. Hayhurst and Jane Doe Hayhurst reside in Las Vegas, Nevada and together comprise a marital community under the laws of the state of Nevada. At all times relevant to this Complaint, defendant Donald C. Hayhurst ("Hayhurst") acted on his own behalf and on behalf of his marital community.

3. Defendant American Academy of Naturopathic Physicians ("Academy") is believed to be a nonprofit corporation formed under the laws of the state of Nevada and having a principal place of business in Las Vegas, Nevada.

II. Jurisdiction and Venue

4. This is an action for trademark infringement under 15 U.S.C. § 1114 and unfair competition under the Lanham Act, 15 U.S.C. § 1125(a). Jurisdiction is proper in this court under 15 U.S.C. § 1121 and 28 U.S.C. § 1338. This Court has jurisdiction over the pendent state claims pursuant to 28 U.S.C. § 1338(b).

5. Venue is proper under 28 U.S.C. § 1391(b) and (c). Each of the defendants has conducted activities in interstate commerce, including within this judicial district. Defendants have jointly obtained and operated Internet sites under the domain name *aanp.com* in which they advertise their services. The Internet site is directed to and accessible by residents of this judicial district. In addition, defendants have directly targeted consumers within this judicial district, including by sending mailings to naturopathic physicians residing within this district. Such mailings advertise the services offered by the defendants and invite the recipients to attend the national convention to be held in Las Vegas in September, 1998.

III. Statement of Facts

6. Plaintiff AANP is a non-profit organization that advances the goals of naturopathic physicians and assists

state naturopathic associations in national affairs. AANP's activities include efforts to unify the profession of naturopathic medicine and address issues of national concern and importance; education of the public; seeking and maintaining federal recognition of an accreditation agency for qualified naturopathic medical education institutions, and efforts to develop national licensing standards and examinations. Many state associations of naturopathic physicians, federally recognized schools, and specialty societies govern the AANP through a duly elected House of Delegates.

7. Beginning in 1986, AANP has organized and held annual national conventions around the United States, including in Arizona, Oregon, Washington, and Montana.

8. Since its inception, AANP has operated in interstate commerce using the trademark and trade name "AANP" widely throughout the United States. Among other things, AANP has worked to enact strict licensing standards for naturopathic physicians; contacted various state governmental officials regarding legislation of interest to the naturopathic profession; communicated with licensing boards on matters of professional concern to naturopathic physicians; worked at the national level to support the Council on Naturopathic Medical Education in obtaining and maintaining recognition by the United States Department of Education as the accrediting agency for naturopathic medical education; and representation of members and the profession to media throughout the United States; and other related activities. AANP's activities have been open and well publicized throughout the United States.

9. AANP holds a federal trademark registration, Registration No. 1,777,777, for the mark "American Association of Naturopathic Physicians" for association services, namely, promoting the interests of naturopathic physicians. AANP also holds a federal trademark registration, Registration No. 1,667,777, for the mark "AANP" for association services, namely, promoting the interests of naturopathic physicians. The AANP mark issued on December 3, 1991, and Section 8 and 15 declarations were filed [sic] on January 24, 1997.

10. Defendant Hayhurst is a resident of Las Vegas, Nevada, who holds himself out to the public as a naturopathic physician. For many years, Hayhurst has organized and has been actively involved in an entity known as the American Naturopathic Medical Association ("ANMA"), which purports to be a trade association consisting of naturopathic practitioners throughout the United States. ANMA and Plaintiff AANP have been competing associations offering competing services and purporting to represent the naturopathic profession. Hayhurst has been fully aware of the existence of Plaintiff AANP and its purposes and efforts at least since 1987.

11. In November, 1990, Hayhurst caused the name of the Nevada corporation known as the Nevada Association of Naturopathic Physicians to be changed to the American Association of Naturopathic Physicians ("the Nevada Corporation") by filing relevant papers with the Nevada Secretary of State. At the time, Hayhurst was listed in documents filed with the Nevada Secretary of State as the president of the Nevada corporation. Hayhurst changed the name of the Nevada corporation

despite knowing that Plaintiff AANP previously appro-

12. After changing the name of the Nevada Association of Naturopathic Physicians to the American Association of Naturopathic Physicians, Hayhurst and the Nevada Corporation conducted business under the trademark and trade name AANP. On a continuing basis, Hayhurst and the Nevada Corporation also offered services to persons throughout the United States, including the Western District of Washington, under the names "American Association of Naturopathic Physicians," and "AANP-WA, D.C." Such use of the names American Association of Naturopathic Physicians and AANP have been willful and with full knowledge that Plaintiff AANP first used each of those marks and trade names.

13. Hayhurst and the Nevada Corporation also solicited members and sought membership dues under the trade names and marks American Association of Naturopathic Physicians and AANP. Further, Hayhurst represented himself as a duly authorized representative of AANP at the International Association of Dentists and Physicians in California.

14. On or about March 18, 1991, Hayhurst received a letter written by Plaintiff AANP's counsel requesting that Hayhurst immediately cease and desist further use of plaintiff's AANP name. Hayhurst did not respond to the letter, but rather continued to improperly use the AANP trade name and mark.

15. On or about October 10, 1991, Plaintiff AANP filed a complaint in this judicial district against Donald C.

Hayhurst, Jane Doe Hayhurst, and the Nevada Corporation, alleging unfair competition, service mark infringement, and trade name infringement. A copy of that complaint is attached hereto as Exhibit 1.

16. On December 2, 1997, the Hon. Thomas S. Zilly filed an order granting Plaintiff AANP's motion for summary judgment and permanently enjoining Hayhurst in his capacity as an officer and the Nevada Corporation from, among other things, further use of the name "AANP" or "American Association of Naturopathic Physicians." A copy of the Court's order is attached hereto as Exhibit 2.

17. Sometime after the entry of the permanent injunction, Defendants Academy and Hayhurst began using the trademark and trade name "AANP" in association with the organization of Naturopathic Physicians. Academy and Hayhurst contend that their acronym "AANP" stands for the American Academy of Naturopathic Physicians, in contrast with Plaintiff AANP's trademark and trade name American Association of Naturopathic Physicians. Defendants Hayhurst and Academy use the trademark and trade name AANP in their mailings advertising their services and their national convention (apparently held in conjunction with the ANMA convention), as shown in the flyer attached hereto as Exhibit 3.

18. On or about October 6, 1997, Hayhurst, acting individually or on behalf of Academy, obtained an Internet domain name registration for the domain name *aanp.com*. The Internet site provides content offering the services of the defendants under the trademark and trade

name AANP. A copy of defendants' Internet posting is attached hereto as Exhibit 4.

IV. UNFAIR COMPETITION UNDER THE LANHAM ACT, 15 U.S.C. § 1125(A)

19. Plaintiff AANP realleges the allegations of paragraphs 1-18.

20. Defendants' unlawful use of the marks "AANP" and "American Academy of Naturopathic Physicians" in interstate commerce has caused and will continue to cause confusion, mistake, and deception in that the public is likely to believe that Defendants' organization is the same as, or associated with, Plaintiff AANP. Defendants' activities have caused and will continue to cause substantial and irreparable injury to Plaintiff AANP.

21. Defendants' actions constitute a violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

22. At all relevant times, Defendants have been aware of Plaintiff AANP's prior use of and rights to the AANP mark. Despite being directly or indirectly ordered to cease all use of the AANP mark, Defendants continue to do business under the AANP mark. Accordingly, Defendants' conduct has been willful and will continue unless enjoined by this Court.

V. TRADEMARK INFRINGEMENT UNDER 15 U.S.C. § 1114.

23. Plaintiff AANP realleges the allegations of paragraphs 1-22.

24. Defendants' actions constitute trademark infringement under 15 U.S.C. § 1114 entitling Plaintiff AANP to injunctive relief and damages in an amount to be determined at trial.

VI. Common Law Unfair competition

25. Plaintiff AANP realleges the allegations of paragraphs 1-24.

26. Defendants' actions constitute a violation of the common law doctrine of unfair competition entitling Plaintiff AANP to injunctive relief and damages in an amount to be determined at trial.

VII. Violation of THE Washington Consumer Protection Act, RCW 19.86.010, *et seq.*

27. Plaintiff AANP realleges the allegations of paragraphs 1-26.

28. Defendants' activities constitutes unfair or deceptive acts in trade or commerce, affecting the public interest in the State of Washington and elsewhere. Plaintiff AANP has been damaged in its business or property as a direct result of Defendants' activities. Defendants' acts constitute a violation of the Washington Consumer Protection Act, RCW 19.86.010 *et seq.* Plaintiff AANP is entitled to injunctive relief and damages in an amount to be proven at trial.

VIII. Common Law Service Mark Infringement

29. Plaintiff AANP realleges the allegations of paragraphs 1-28.

30. Defendants' acts constitute common law service mark infringement of both the marks "AANP" and "American Academy of Naturopathic Physicians," entitling Plaintiff AANP to injunctive relief and damages in an amount to be proven at trial.

IX. Common Law Trade Name Infringement

31. Plaintiff AANP realleges the allegations of paragraphs 1-30.

32. Defendants' acts constitute common law trade name infringement of the names "American Association of Naturopathic Physicians" and "AANP," entitling AANP to injunctive relief and damages in an amount to be proven at trial.

WHEREFORE, Plaintiff AANP prays for the following relief:

A. Damages in an amount sufficient to compensate Plaintiff for the injuries caused by Defendants' activities;

B. Treble damages pursuant to 15 U.S.C. § 117, RCW 19.86.090, or other applicable law;

C. Attorneys' fees and costs incurred by Plaintiff AANP in bringing this action;

D. Preliminary and permanent injunctive relief against all Defendants, individually and in any representative capacity, and their agents, servants, employees, successors, and assigns from the following:

1. Using the names "American Association of Naturopathic Physicians," "American Academy of Naturopathic Physicians," "AANP" or any derivative, colorable imitation, or confusingly similar names;

2. Filing applications to register the names "American Association of Naturopathic Physicians," "American Academy of Naturopathic Physicians," "AANP" or any derivative, colorable imitation, or confusingly similar names as corporate names, tradenames, trademarks, or service marks with any governmental agency;

3. Using the Internet domain name *aanp.com*, or any domain name that is a derivative of, colorable imitation of, or is confusingly similar to the names "American Association of Naturopathic Physicians," "American Academy of Naturopathic Physicians," or "AANP";

4. Filing applications to register any domain name in any country that is a derivative of, colorable imitation of, or is confusingly similar to, in whole or in part, the names "American Association of Naturopathic Physicians," "American Academy of Naturopathic Physicians," or "naturopathic";

E. An order requiring delivery to Plaintiff for destruction all correspondence, stationery, advertisements, brochures, or other materials in the possession of

defendants and their agents, servants, employees, successors, and assigns that bear the names "American Association of Naturopathic Physicians," "American Academy of Naturopathic Physicians," or "AANP" or any derivative, colorable imitation, or confusingly similar names;

F. An order requiring Defendants to change the name of Defendant Academy to a name other than "American Association of Naturopathic Physicians," "American Academy of Naturopathic Physicians," or "AANP" or any derivative, colorable imitation, or confusingly similar names;

G. An order requiring Defendants to transfer ownership in the domain name *aanp.com* to Plaintiff;

H. An order requiring Defendants to send a written notice to all recipients of its mailings bearing the marks "AANP" or "American Academy of Naturopathic Physicians," and to all persons who have viewed Defendants' Internet site, setting forth Plaintiff's exclusive ownership of and rights to its trademarks and trade names and disavowing any relationship between Plaintiff and Defendants; and

I. Such other relief as the Court deems just and proper.

Dated this 24th day of July, 1998.

CHRISTENSEN O'CONNOR
JOHNSON & KINDNESS PLLC

/s/ Lawrence D. Graham
James R. Uhlir, WSBA No. 2,365
Lawrence D. Graham,
WSBA No. 25,402
Attorneys for Plaintiff American
Association of Naturopathic Physicians

American Naturopathic Medical Association

A N M A

is pleased to announce its

1998

ANMA Annual Convention & Educational Presentation

Friday, Saturday, Sunday September 11, 12, 13, 1998

Activities begin Friday morning at 8:00 a.m. and end Sunday at 3:00 p.m.

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For Hotel Registration: 1-800-634-6753 or 1-702-794-9412

Room Rate: $79.00 per night (single/double)

Before 8/11/98
ANMA member $98.00
Non-Member $350.00

At the door add $50.00
Students / Retired member - $98.00
Staff/Office Assist: $150.00

☐ *I am renewing my dues now by enclosing $250 plus $98.00 to register for the '98 convention.*

Please register me for the ANMA 1998 Las Vegas Convention

NAME: _____

ADDRESS: _____ CITY: _____

STATE: _____ ZIP: _____ PHONE: ( ) _____

VISA/MC/AM.EX. _____ EXP. DATE: _____

SIGNATURE: _____

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☐ Please reserve me in for the Special Banquet on Friday evening. Enclosed is an extra $25.00 per person

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American Association *for* Advanced Alternative Medicine

This memo is produced by and for AAAAM in our desire to support the ANMA convention. This decision was made with the unanimous vote of the Board of Directors because of ANMA's policies and outstanding achievements.

TO: American Association for Advanced Alternative Medicine (AAAAM) members, supporters, & Specialists in Natural Health Care Medicine.

MESSAGE: The *AAAAM* will hold its first annual convention September 11,12, 13, 1998 at the Rivera Hotel & Casino Las Vegas, Nevada in conjunction with and support of the world's largest natural health organization the American Naturopathic Medical Association (ANMA). Others participating in this convention are American Academy of Naturopathic Physicians (AANP), Associated Naturopaths of America (ANA), Committee on Naturopathic Medical Education (CNME), as well as all affiliated state and foreign naturopathic organizations.

PURPOSE: To present a strong forum bringing together the many thousands of doctors supporting natural health care. To encourage a united and co-operative effort as a way of bringing about fair and equitable licensing in naturopathic medicine. We are dedicated to preserving the freedom of choice in health care for the public as well as the practitioner.

PROGRAM: Excellent speakers licensed or certified as medical professionals around the world.
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HOTEL: Riviera Hotel & Casino
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September 11, 12, 13, 1998 Friday, Saturday & Sunday
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REGISTRATION FEE: If you are a current member of ANMA, the registration fee is $98.00. If you join ANMA now at the $250 membership fee, you can add the $98.00 registration fee for a total of $348.00 for both, which is still less than the non member rate of $350.00 to attend the convention. ANMA issues a beautiful membership certificate and card. We support this association above all others and have enclosed an ANMA application and flyer.

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Make your reservation early by signing up now! This will be the largest gathering of natural health care physicians ever to assemble in America.

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DONALD C. HAYHURST
JANE DOE HAYHURST
P.O. Box 96273
Las Vegas, NV 89193
(702) 897-7053

Defendants "Pro Se"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, Plaintiff, **DONALD C. HAYHURST, JANE DOE HAYHURST, and AMERICAN ACADEMY OF NATUROPATHIC PHYSICIANS,** Defendants.	Case No.: C98-1055C **Affidavit of Defendant Hayhurst In Support of Prior Motion to Vacate/ Set Aside Default Judgment, and Motion to Dismiss, and Objection to Scheduled Evidentiary Hearing** NOTE ON MOTION CALENDAR: April 23, 1999

AFFIDAVIT OF DEFENDANT HAYHURST IN SUPPORT OF PRIOR MOTION TO VACATE/SET ASIDE DEFAULT JUDGMENT AND MOTION TO DISMISS AND OBJECTION TO SCHEDULED EVIDENTIARY HEARING

COMES Affiant Donald C. Hayhurst, Pro Se with Affidavit in Support of Prior Motions To Set Aside/ Vacate Default Judgment And Motion To Dismiss, And Objection To Scheduled Evidentiary Hearing as ordered March 26, 1999 based on new evidence and possible fraud/irregularities, and deception in this matter.

1. That I am the Defendant in this cause, and the Affiant herein, and make this affidavit from personal knowledge, and am competent to testify to the facts herein.

2. To be sure that not one fact goes unnoticed by this Court, affiant sets forth in this affidavit, all prior statements made in previous pleadings, motions, and affidavits.

3. The State of Washington is violating Affiants civil rights by ordering Affiant Hayhurst to the State of Washington with no guarantee of protection from a multitude of possible harms, and from service of summons.

4. The State of Washington has not venue, personal or subject matter jurisdiction over Defendants, and Affiant does not want to become a victim of this Court. If Defendant Hayhurst actually came to State of Washington, and Plaintiff's served Defendant Hayhurst in State of Washington, the State would then gain jurisdiction that it does not now have over Affiant.

5. Affiant Hayhurst is attaching two notarized pictures of himself for this Honorable court, one taken in 1987 and one current. Affiant weighs 148 pounds and has *never* throughout life weighed over 158 or 160 pounds (see Exhibit "A").

6. This Court entered Affiant Hayhurst into default status based on a bogus statement and affidavit from a process sever, and plaintiff's, knowing Affiant's appearance will, allowed the falsified affidavit to be entered into the court record.

7. In this instance, Affiant does not believe it is Affiant's responsibility to prove to this court Affiant was not served, but the responsibility of

plaintiffs and the process server to prove service was made on Affiant Hayhurst. *It was not.*

8. Affiant Hayhurst begs this Court's understanding. While Affiant does not wish to irritate this Court, Affiant wants nothing more than justice and fairness, and requests such with respect to this Honorable Court.

9. The Court should reverse its decision mandating an appearance and set aside the default based on the merits of Defendants argument as follows:

(A) Newly discovered evidence indicates State of Washington accepted and entered a bogus case from a non-existent bogus organization.

(B) Affiant has recently learned that Plaintiff's who initiated original complaint are not who they say they are, and they do not have rights to the title "American Association of Naturopathic Physicians (AANP)" in the State of Oregon or Washington, or the right to do business in the State of Washington (See Exhibit "B").

(C) Plaintiff is not a valid party or entity to maintain this matter as Plaintiff is not a valid corporation at this time, and was not a valid corporation at time of filing Complaint, or receiving default judgment. (See Exhibit "C").

10. In addition, Affiant believes this Court erred in returning Affiants "Supplement to Motion to Dismiss" stating the Court did not know how to handle supplements once Plaintiff had answered. The fact remains, the Motion to Dismiss had not been answered as stated in "AANP's Opposition to Defendants Supplement to Dismiss" (Exhibit "D").

11. Therefore, Affiant believes the Court erred in its Minute Order and is not considering Affiant's Civil rights, and further, as no legitimate case exists, this Court should set aside and vacate default judgment, dismiss this matter, and allow Plaintiff's to re-evaluate their position to determine if a legitimate case exists.

WHEREFORE DEFENDANT PRAYS this Honorable Court will reconsider its Minute Order, vacate/set aside default judgment, and dismiss this case.

Further, Affiant sayeth naught.

/s/ D. C. Hayhurst, Pro Se
Donald C. Hayhurst, Pro Se
Affiant

SUBSCRIBED and **SWORN** to before me on

This 6 day of April, 1999.

/s/ Julie Coombs
NOTARY PUBLIC
State of Nevada, County of Clark

[SEAL]
JULIE ALDENE COOMBS
Notary Public – State of Nevada
Appointment recorded in Clark County
My appointment expires Oct. 19, 1999
#95-00930-1

NOTARY

Honorable John C. Coughenour
Additional Copy for Magistrate Judge Wilson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, Plaintiff, v. DONALD C. HAYHURST, JANE DOE HAYHURST, and AMERICAN ACADEMY OF NATUROPATHIC PHYSICIANS, Defendants.	Civil Action No. C98-1055C AANP'S OPPOSITION TO DEFENDANTS' SUPPLEMENT TO MOTION TO DISMISS

Donald Hayhurst's motion is based on misleading facts, reveals his further efforts to trade upon AANP's goodwill, and lacks any legal foundation for the relief it seeks. As such, Hayhurst's motion should be denied.

I. AANP HAS STANDING TO BRING THIS ACTION

At all times, AANP has been an Oregon corporation in good standing. As Hayhurst states, a renewal fee was

due on January 31, 1998. But because the Oregon Secretary of State had an

* * *

trademark and trade names AANP and AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, and has standing to bring the present action.

II. THE ALLEGED VIOLATIONS OF HAYHURST'S CIVIL RIGHTS ARE UNFOUNDED

Hayhurst's allegation that the State of Washington is violating his civil rights is unfounded. This Court can compel Hayhurst's attendance, particularly considering that Hayhurst has waived any objection that he is not subject to personal jurisdiction in this Court.

III. THE COURT MAY EXERCISE PERSONAL JURISDICTION OVER HAYHURST, AND VENUE IS PROPER IN THIS COURT

Rule 12(g) of the Federal Rules of Civil Procedure is unequivocal: any motion made under Rule 12 must join all other defenses or objections permitted under Rule 12. Defenses not asserted in an initial Rule 12 motion may not be raised later. On or about January 25, 1999, Hayhurst filed a motion to set aside the default judgment, leading to the Court's scheduling of an evidentiary hearing. In that motion, Hayhurst asserted improper service under Rule 12(b)(5), but did not complain that the Court lacked personal jurisdiction under Rule 12(b)(2) or that

venue was improper under Rule 12(b)(3). Consequently, Hayhurst has waived such objections.

In addition, personal jurisdiction is proper in this Court. In order to prevail, AANP need only present a *prima facie* case for personal jurisdiction. *E.g., Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1 F.3d 848, 850 (9th Cir. 1993). Further, the allegations in the complaint are to be taken as true. Among other things, the Complaint alleges that Hayhurst "directly targeted consumers within this judicial district, including by sending mailings to naturopathic physicians residing within this district." Complaint at ¶ 4. Hayhurst does not controvert any facts in the compliant, and presents no additional facts weighing against the exercise of personal jurisdiction. Likewise, Hayhurst simply states that venue is improper, without more. Under these circumstances, Hayhurst's motion must be denied.

* * *

V. CONCLUSION

For the foregoing reasons, Hayhurst's motion should be denied and the default judgment sustained.

Dated this 10th day of May, 1999.

CHRISTENSEN O'CONNOR
JOHNSON & KINDNESS PLLC

/s/ Lawrence D. Graham
James R. Uhlir,
WSBA No. 2,365
Lawrence D. Graham,
WSBA No. 25,402
Attorneys for Plaintiff, AANP

DONALD C. HAYHURST
JANE DOE HAYHURST
P.O. Box 96273
Las Vegas, NV 89193
(702) 897-7053

Defendants "Pro Se"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, Plaintiff, vs. **DONALD C. HAYHURST, d/b/a aanp.com and aannp.com; JANE DOE HAYHURST, and AMERICAN ACADEMY OF NATUROPATHIC PHYSICIANS,** Defendants.	Case No.: C98-1055C **DEFENDANTS OBJECTIONS TO THE REPORT, RECOMMENDATION AND PROPOSED ORDER OF MAGISTRATE JUDGE WILSON** MOTION CALENDAR: June 25, 1999

DEFENDANTS OBJECTIONS TO THE REPORT, RECOMMENDATION AND PROPOSED ORDER OF MAGISTRATE JUDGE WILSON

COMES NOW, the Defendants HAYHURST, Pro Se, in a timely manner with objection to the Report, Recommendation, and proposed order by Magistrate Judge David Wilson based on the following:

1. That the Magistrate Judge David Wilson was prejudiced against Defendant Hayhurst for failure to appear at the evidentiary hearing as ordered by the Magistrate Judge.

2. That Defendant Hayhurst's failure to appear was not due to disrespect for the Court but due to poor health, and it was burdensome to Defendant.

3. That Judge Wilson incorrectly states that Defendants admit living at 8170 Creek Water Lane, that what Defendant did say is that defendant's son found a letter dated 1/13/99 with attached default order on sidewalk leading to daughter's home. Defendant did not say he lived there even though he is occasionally there and signed for a delivery at that address on April 29, 1999. Defendant's daughter will handle all defendant mail.

4. Judge Wilson misinterprets Defendants referral to the State of Washington Court. Defendant understands that this is a federal court for the Western District of the State of Washington and that jurisdictional boundaries are primarily restricted to the Western District of Washington, unless Plaintiff's can show why the Western District of Washington should extend to Defendant in the State of Nevada. Jurisdiction is not proper and will be addressed when and if default is set aside.

5. It might be more polite to say that the Process Server, Edward Gutierrez is not speaking the truth, but it is more factual to state that Edward Gutierrez is an

* * *

4. Dismiss this case for lack of service and jurisdiction, or for other appropriate matters.

Respectfully submitted this 7th day of June, 1999.

/s/ DC Hayhurst, Pro Se
Donald C. Hayhurst, Pro se
Defendant

/s/ Jane Doe Hayhurst, Pro Se
Jane Doe Hayhurst, Pro Se
Defendant

Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, **Plaintiff,** **v.** **DONALD C. HAYHURST; JANE DOE HAYHURST, and AMERICAN ACADEMY OF NATUROPATHIC PHYSICIANS,** **Defendants.**	Civil Action No. C98-1055C **AANP'S RESPONSE TO DEFENDANTS' OBJECTIONS TO PROPOSED ORDER OF MAGISTRATE JUDGE WILSON**

The Court should adopt the report and recommendation of the Honorable David E. Wilson, United States Magistrate Judge, denying defendant Hayhurst's motion to vacate and set aside the default judgment under Rule 55(c). Most of Hayhurst's "objections" are similarly a repetition of previous arguments; those that are not repetitive are untimely, baseless, and incorrect. Consequently, the proposed order of Magistrate Judge Wilson should be adopted.

* * *

4. Hayhurst has never provided any evidence – or even any suggestion – that he resides at any other address. In fact, he lists only a post office box for an address in all papers filed with the Court.

In view of the above uncontroverted evidence, there is no doubt that Hayhurst lives at 8170 Creek Water Lane and that he was personally served with the complaint at that address.

HAYHURST'S NEW EVIDENCE AND ARGUMENTS SHOULD NOT BE ADMITTED

Most of Hayhurst's remaining "objections" are either new arguments or are based on new evidence that should have been presented earlier. For example, Hayhurst challenges the testimony of the process server even though he could have done so in a timely fashion if he had appeared at the evidentiary hearing. Hayhurst also asserts that it would be "out of character" for him to ignore a process server. While such a statement could not have been made with a straight face, the argument and any support for it should have been made to Magistrate Judge Wilson in the first instance. Further, the defenses asserted by Hayhurst, such as the assertion that AANP does not hold a federal trademark registration, are also untimely. As the Ninth Circuit held in *Greenhow v. Secretary of Health and Human Services*, 863 F.2d 633, 638 (9th Cir. 1988), a party waives his right to make such arguments by failing to present them to the magistrate in the first instance. Hayhurst's lengthy string of supplement briefs must stop at some point.[2]

---

[2] Hayhurst's original motion to vacate and set aside default judgment addressed only the sufficiency of service. In addition to the new evidence and arguments presented in his objections to the magistrate's report, Hayhurst has filed four supplemental "motions" or "affidavits."

JURISDICTION OVER HAYHURST IS PROPER

Hayhurst simply states, without more, that jurisdiction is not proper in this district. As AANP has previously explained, Hayhurst waived this defense by failing to raise it earlier.[3] In any event, jurisdiction over Hayhurst is proper and amply supported by the complaint and several other papers previously filed by AANP.

* * *

period, and his continued use of those trademarks and trade names is causing confusion in the marketplace. In sum, Hayhurst has no meritorious defense.

Third, as previously explained, substantial evidence indicates that Hayhurst had both actual and constructive notice that AANP had filed a complaint. Hayhurst has also followed an intentional pattern of evading service, in this and other courts. Consequently, Hayhurst's culpable conduct contributed to the default, and the motion to set aside the default judgment should be denied.

CONCLUSION

The report and recommendation of Magistrate Judge Wilson should be adopted.

---

[3] See AANP's opposition to defendants' supplement to motion to dismiss, filed May 10, 1999, at p. 3.

Dated this 18th day of June, 1999.

CHRISTENSEN O'CONNOR
JOHNSON & KINDNESS PLLC

/s/ Lawrence D. Graham
James R. Uhlir, WSBA No. 2,365
Lawrence D. Graham,
WSBA No. 25,402
Attorneys for Plaintiff American
Association of Naturopathic
Physicians

Supreme Court, U.S.
FILED

001356 JAN 30 2001

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No. _____

In The

Supreme Court of the United States

DONALD C. HAYHURST,
JANE DOE HAYHURST,

Petitioners,

v.

AMERICAN ASSOCIATION OF
NATUROPATHIC PHYSICIANS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX

MARIANNE DUGAN
Counsel of Record
FACAROS & DUGAN
Attorneys for Both Petitioners
485 East 13th Avenue
Eugene, OR 97401
(541) 484-4004

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OR CALL COLLECT (402) 342-2831

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, Plaintiffs, v. DONALD C. HAYHURST; JANE DOE HAYHURST, and AMERICAN ACADEMY OF NATUROPATHIC PHYSICIANS, Defendants.	No. C98-1055C REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO VACATE AND SET ASIDE DEFAULT JUDGMENT RULE 55 (c) AND MOTION TO DISMISS

INTRODUCTION

On March 9, 1999, The Honorable John C. Coughenour, Chief Judge, referred to this Court pursuant to 28 U.S.C. § 636(b) (1), Local Rule MJR 4 (a) (3) and Fed. R. Civ. P. 72(b), the above dispositive motions for a report and recommendation. (Doc. #27). By this report and recommendation, the Court recommends that the motions be DENIED.

DISCUSSION

1. The Motion to Vacate or Set Aside the Default Judgment

On January 7, 1999 the Court (Chief Judge Coughenour) entered default judgment against the Defendants. On January 26, 1999, the Defendants filed a motion to set aside the default judgment, averring that Defendant Hayhurst had not been properly served "officially or unofficially" with the complaint or with the motion for default, and had no knowledge of the "matter pending before this Honorable Court" prior to January 19, 1999. (Doc. #19). Plaintiffs, in moving for default judgment, had represented to the Court that Mr. Hayhurst had been personally served at his home in Las Vegas (Doc. #15), an argument which they repeat in opposing the motion. (Doc. #21).

The parties' contentions as to whether Defendant Hayhurst was properly served are thus in direct conflict as set forth in their filings. In their Objection to Plaintiff's Opposition to Motion to Vacate and Set Aside Default Judgment (Doc. 23), Defendants Donald C. and Jane Doe Hayhurst acknowledge that they live at "8170 Creek Water Lane, Las Vegas, Nevada," but contend that the process server's description of the male individual who he served is inconsistent with the appearance of Defendant Hayhurst. (*Id.* at 3).

On March 26, 1999, the Court held a telephone status conference attended by the Defendant Donald Hayhurst, pro se, and Lawrence Graham, Esq., counsel for Plaintiff. At that conference, the Court informed the parties that it had reviewed the filings on the issue of service and

determined that an evidentiary hearing was necessary and would be held before the Court on May 12, 1999, at 1:30 p.m. (Doc. #28). The date of the hearing was set in order to provide Mr. Hayhurst an opportunity to retain a lawyer, which he indicated during the conference that he wished to do. Mr. Hayhurst agreed during the conference that the date selected would provide him adequate opportunity to consult with and/or retain an attorney beforehand.

During the conference, Mr. Hayhurst expressed great reluctance to attend the evidentiary hearing, expressing concern that it would provide the Plaintiffs with an opportunity to serve pleadings upon him. In making these arguments, Mr. Hayhurst, on several occasions during the conference, referred to the Court as a "State of Washington" court. The Court explained to the Defendant its status as a federal, and not a state court. The Court explicitly explained to the parties that it was ordering the personal appearance of the Defendant Donald Hayhurst and the process server, Edward Gutierrez, so that it could resolve the question of which witness was telling the truth, by observing their respective demeanors. The Court also advised both parties that failure of either Mr. Hayhurst or the process server to appear before the Court as ordered would be considered in resolving the service issue. (*Id.*). On that same date, the Court issued a Minute Order (Doc. #29) ordering Plaintiff to produce at the hearing the process server, ordering Defendant Donald Hayhurst to appear in person, and reminding the parties that failure to comply with the Order "will be considered by the Court in deciding this motion." (*Id.*).

On April 7, 1999, Defendant Donald Hayhurst filed an Affidavit of Defendant Hayhurst in Support of Prior Motion to Vacate/Set Aside Default Judgment and Motion to Dismiss and Objection to Scheduled Evidentiary Hearing. (Doc. #30). In this filing, Defendant Hayhurst again expressed the view that "the State of Washington" was violating his rights by ordering him to appear for the evidentiary hearing. Mr. Hayhurst clearly indicated in the filing that he was refusing to attend the hearing, and asked the Court to reconsider its Order setting the hearing. (*Id.*). Mr. Hayhurst attached to his filing photographs which he swore under oath are photographs of himself and his wife. (Doc. #30, exhibit).

On the day of the hearing, the Court received a letter from Defendant Hayhurst confirming that he would not attend the hearing and offering a statement from a physician that he had been advised to avoid travel. (Doc. #33).

Plaintiffs duly appeared as ordered at the evidentiary hearing and called as a witness the process server, Edward E. Gutierrez. Mr. Gutierrez testified that he is a former agent of the federal Drug Enforcement Agency who is now in private life, working as a private investigator and process server. Mr. Gutierrez identified the photographs attached to Defendant Hayhurst's filing (Doc. 30), as being the person he served legal papers on in this case on three different occasions, at Defendant Hayhurst's address at 8170 Creekwater Lane, Las Vegas, Nevada.

The first service occurred on April 24, 1998, and the papers served were a "Service package with a copy of trademark registration" (Transcript of Evidentiary Hearing [hereinafter, "Tr."] at 7). He testified that on this

occasion Defendant Hayhurst came to the door and opened it, but then closed it when he realized the witness' purpose. The witness testified that he informed the Defendant through the door that he was leaving the papers on the step in front of the door and that the Defendant was served.

The witness testified that he served the summons and complaint on Defendant Hayhurst on August 13, 1998. (Tr. at 11). He testified that on that date he arrived at the Defendant's residence, and found Defendant's son in the open garage of the dwelling. While he was talking to the son, the Defendant came out of the residential portion of the dwelling into the garage and spotted the process server, who told him that he had a summons to serve. The witness testified that Defendant stated that he "did not want the papers," and quickly left the garage. The witness testified that he informed the Defendant that he was leaving the papers in the garage, and also told the son that he was leaving the papers in the garage, which he in fact did. (Tr. at 12). He testified that Defendant did not exhibit any signs of ill health.

Mr. Gutierrez testified that on January 14, 1999, he served the preliminary injunction and order on default judgment on Defendant Hayhurst. On this occasion, he waited outside the Defendant's home until Defendant Hayhurst exited his house. When Defendant spotted the process server, he hurriedly headed back into the house, but not before he was told that the process server had papers to serve upon him. The witness testified that since his last visit to Defendant's home, Defendant had installed a bar in front of his door which prohibited the process server from reaching the front door. Defendant

Hayhurst told the process server to "leave it out here on the steps . . . I don't care." (Tr. at 14). The witness testified that he placed the documents on the front step as directed by the Defendant. (Tr. at 15).

As indicated, Mr. Gutierrez identified the photographs submitted by Defendant as being the person he served on the three occasions set out above. (R. 16).

The Court found the witness Gutierrez to be credible in his testimony. The Court finds Defendant Hayhurst's representations to the Court that he was not the person served by the process server, not to be credible. Nor does the Court find credible Defendant Hayhurst's preferred "medical excuse" for not attending the evidentiary hearing, as ordered. Mr. Hayhurst made it clear to the Court prior to submitting the statement from his doctor, that he did not intend to comply with the Court's orders. He disobeyed the order to appear for the hearing after being warned by the Court that his failure to comply might be considered by the Court in resolving the issue of credibility on the service dispute.

In order to prevail in their motion to set aside the default judgment, Defendants must satisfy the requirements of Federal Rule of Civil Procedure 60(b). In *In re Hammer*, 940 F.2d 524 (9th Cir. 1991), the Court of Appeals held that such motions may be denied if "(1) the plaintiff would be prejudiced if the judgment is set aside, (2) defendant has no meritorious defense, *or* (3) the defendant's culpable conduct lead to the default." 940 F.2d at 524-25 (emphasis supplied). The Court's decision explicitly stated that "[t]his tripartite test is disjunctive." 940

F.2d at 526. The Court went on to define "culpable conduct" as being conduct where "he has received actual or *constructive* notice of the filing of the action and failed to answer the complaint." (*Id.*, emphasis in the original.)

In my opinion, Defendants fail on all three legs of the test here. First, it is clear that Plaintiffs would be prejudiced by the granting of the motion, in that they have duly sought resolution of the dispute reflected in this case and have played by the rules. Second, Defendants have made no showing that they have a meritorious defense (or, in fact, any defense at all). Third, it is clear that the Defendants had "actual or *constructive* notice of the filing of the action and failed to answer the complaint" (940 F.2d at 526). There is little doubt, given the Court's findings as to the communications between the process server and Defendant Hayhurst, that Defendants had "actual" notice of the action. Moreover, even if the issue of actual notice was resolved against the Plaintiffs (despite the evidence to the contrary), Defendants had "constructive" notice, and their conduct was thus "culpable" within the meaning of the third leg of the tripartite test.

Accordingly, I recommend that Defendants' motion to vacate/set aside default judgment, be DENIED.

The Motion to Dismiss

The Defendants also seek to have the Court dismiss this action. Initially, they sought dismissal because they were never "served by any form of process server in this matter . . . " (doc. #20). Thereafter, following the telephone conference, Defendant Hayhurst filed an affidavit

in which he contends that Plaintiff's corporate status had lapsed and Plaintiff could not maintain this action. Defendant Hayhurst maintains in his latest affidavit that "plaintiffs . . . do not have rights to the title 'American Association of Naturopathic Physicians (AANP) in the State of Oregon or Washington. . . . " (Doc. #30, par. 9(B)), and that they are "not a valid corporation at this time . . . [or] at the time of filing Complaint, or receiving default judgment." (*Id.*, par. 9(C)).

Plaintiffs have submitted a preliminary injunction order issued by the United States District Court for the District of Oregon, on May 11, 1999, in the case of *AANP, an Oregon nonprofit corporation v. American Association of Naturopathic Physicians, an Oregon Corporation*, CV 99-440-HA. In that order, the United States District Court explicitly found that plaintiffs have "at all times since 1989 . . . been a nonprofit corporation organized and existing under the laws of the state of Oregon." The District Court in Oregon has thus rejected the argument now made by Plaintiff that Plaintiff is not a valid Oregon corporation, and explicitly found to the contrary.

Accordingly, Defendants have presented no grounds for granting their motion to dismiss, and I recommend that the Court DENY the motion.

A proposed order is included with this Report and Recommendation.

DATED this 25th day of May, 1999.

/s/ David E. Wilson
DAVID E. WILSON
United States Magistrate Judge

Supreme Court, U.S.
FILED
MAR 30 2001
CLERK

(3)

No. 00-1356

In The

Supreme Court of the United States

DONALD C. HAYHURST, JANE DOE HAYHURST,

Petitioners,

v.

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LAWRENCE D. GRAHAM
Counsel of Record
BLACK LOWE & GRAHAM PLLC
816 Second Avenue
Seattle, WA 98104
(206) 381-3300

Attorneys for Respondent American Association of Naturopathic Physicians

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38pp

PARTIES TO THE PROCEEDING

Petitioners are Donald C. Hayhurst; Patricia Hayhurst; and the American Academy of Naturopathic Physicians.

Respondent is the American Association of Naturopathic Physicians.

CORPORATE DISCLOSURE STATEMENT

There are no parent or publicly held companies owning 10 percent or more of the stock in the American Association of Naturopathic Physicians.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions cited by Petitioner, the following rules are involved.

Federal Rule of Civil Procedure 12(g) states in pertinent part:

> If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted. . . .

Federal Rule of Civil Procedure 12(h)(1) states in pertinent part:

> A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g). . . .

STATEMENT OF THE CASE

AANP generally agrees with Petitioners' statement of the case, but believes it should be supplemented with the following details pertinent to the questions presented.

For more than a decade, Petitioner Hayhurst has unfairly competed with Respondent AANP by creating numerous organizations having names that are confusingly similar to AANP. Though Hayhurst has often appeared *pro se*, he has hired multiple attorneys and is no stranger to the courts. Throughout this period, his course

of conduct has reflected an intent to cause harm to AANP and disrespect for the rules of the courts.

In October, 1991, AANP filed a complaint in the Western District of Washington against Hayhurst and a corporation he controlled, alleging unfair competition and trademark infringement. On December 2, 1992, the court permanently enjoined Hayhurst in his capacity as an officer of the corporation from further use of the names "AANP" or "American Association of Naturopathic Physicians." S. App. 3-5.[1]

Despite the permanent injunction, Hayhurst later formed a different entity, the American Academy of Naturopathic Physicians. Although the name was slightly different from plaintiff AANP's American *Association* of Naturopathic Physicians, many consumers would likely overlook the difference. Worse yet, both names are abbreviated AANP. Hayhurst used the AANP mark in mailings to consumers advertising services and promoting a national convention for naturopathic physicians. App. 32. Hayhurst also obtained an Internet domain name registration for aanp.com. S. App. 6. The aanp.com Internet site liberally used the AANP mark in offering services in competition with AANP.

After discovering Hayhurst's registration and use of the aanp.com domain name, AANP sent Hayhurst a cease and desist letter by registered mail. Apparently wary of receiving letters from law firms, Hayhurst refused to

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[1] References to "S. App." are to the appendix contained in this Opposition; references to "App." are to the appendix in the Hayhurst Petition.

accept the letter. AANP then enlisted Mr. Edward Gutierrez of the Central Process Service in Las Vegas to personally serve the letter. Gutierrez served Hayhurst and provided an affidavit of service. S. App. 7.

Hayhurst ignored the cease and desist letter, prompting AANP to file a lawsuit in the Western District of Washington. This time AANP hired a different process server, Legal Wings, Inc., to serve the summons and complaint. Legal Wings attempted service, but was unsuccessful. S. App. 8-9. AANP then returned to Gutierrez, who successfully served Donald Hayhurst (and therefore Patricia Hayhurst as well) on August 13, 1998. S. App. 10-11.

It was hardly surprising to AANP that Hayhurst was difficult to serve. Mr. Gutierrez testified that Donald Hayhurst was notorious for evading service. S. App. 12-13. Further, in a separate action between the parties, the U.S. District Court for the District of New Hampshire concluded that Hayhurst followed "an intentional pattern of avoiding service of process." S. App. 14-18, particularly at 16.

After Hayhurst failed to file a timely answer, AANP sought and obtained a default judgment. AANP again turned to Gutierrez to serve a copy of the judgment. Although Hayhurst had ignored all previous papers served upon him, the default judgment and permanent injunction got his attention. On January 25, 1999 – less than one week after service of the order on default judgment – Hayhurst filed a motion to set aside and vacate the default judgment.

The district court ordered an evidentiary hearing on the issue of service. Though Hayhurst technically appeared before the district court *pro se*, he had counsel assisting and advising him. Indeed, an attorney representing Hayhurst in another matter between AANP and Hayhurst called counsel for AANP to explain that Hayhurst was unlikely to attend the evidentiary hearing. Despite an express order from the district court, Hayhurst did not attend the hearing. Finding the process server's testimony to be credible, the district court denied Hayhurst's motion to set aside the default judgment.

On appeal, AANP argued that Hayhurst waived personal jurisdiction by not raising it in his first motion before the district court. AANP further argued that jurisdiction was proper in the district court in any event, under the rationale of *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998). Consistent with *Panavision*, Hayhurst's long-standing knowledge of AANP and his intent that the domain registration and use would have a harmful effect upon AANP within the state of Washington formed a sufficient basis for personal jurisdiction. Though the Ninth Circuit did not reach the long-arm jurisdiction question, it would have found in favor of AANP had it done so.

REASONS FOR DENYING THE PETITION

I. The Decision of the Court of Appeals does not Conflict with Prior Supreme Court or Ninth Circuit Decisions

Rule 12 unequivocally requires civil litigants to join all Rule 12 defenses together in a single motion. Failure to do so amounts to a waiver of all omitted defenses. Application of this rule to a motion seeking to set aside a default judgment is intended by the Civil Rules and is consistent with a long line of authority holding that personal jurisdiction may be waived.

Pro se civil litigants are not excused from following Rule 12 or other court rules, as this Court and the Ninth Circuit have repeatedly held. Moreover, the Ninth Circuit explained that Hayhurst in particular did not deserve leeway considering his behavior before the district court.

The Ninth Circuit also properly applied the standard for setting aside a default judgment. After dispensing with challenges to service and jurisdiction, the court concluded that there were no other bases under Rule 60(b) that compelled the default to be set aside. This conclusion was properly based on the absence of a meritorious defense and Hayhurst's evasion of service of process.

Finally, nothing in the ruling below conflicts with Ninth Circuit or Supreme Court precedent regarding jurisdiction over Mrs. Hayhurst. As the Ninth Circuit held, Mrs. Hayhurst waived any challenge to personal jurisdiction by omitting it from her initial motion raising other Rule 12 defenses.

A. The Waiver Provisions Of Rule 12 Also Apply To Motions Pursuant To Rule 55

There is a rich tradition under Rules 12(g) and (h) of the Federal Rules of Civil Procedure requiring that certain procedural defenses must be raised in a single motion or in a responsive pleading. The requirements of Rule 12 are straightforward: whether by responsive pleading or by motion, all Rule 12 defenses must be joined together.

Rule 12 must be read with Rules 55 and 60, as the Ninth and Seventh Circuits have done. *See O'Brien v. O'Brien & Associates, Inc.*, 998 F.2d 1394, 1399 (7th Cir. 1993); *American Association of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104 (9th Cir. 2000). Hayhurst cites no authority – and AANP is aware of none – holding that Rule 12 need not be followed after a default is obtained.

The express language of Rule 12 addresses motions of the identical type filed by Hayhurst. Indeed, even as a *pro se* litigant Hayhurst understood his motion to be governed by Rule 12. Hayhurst expressly stated in the motion that relief was requested pursuant to Rule 12(b)(5). S. App. 1.

The separate requirement in Rule 12 that answers must be filed within 20 days of service is of no consequence. As an initial matter, litigants routinely file answers much later, either by stipulation or other court order. Moreover, the assertion that motions raising Rule 12 defenses must be made within 20 days of service is a proposition found neither in the rule nor in the case law. Considering that the consolidation provision of Rule 12 has existed since the 1937 adoption of the Civil Rules, if

Rule 12 were interpreted to require a Rule 12(b) motion to be filed within 20 days of service, Hayhurst would easily have found supporting authority. AANP is aware of no such authority, and Rule 12(b) motions need not be filed within 20 days of service.

Nor does the Ninth Circuit ruling below offend Due Process. Hayhurst makes much of the right to collaterally challenge a default judgment on jurisdictional grounds, citing *Pennoyer v. Neff*, 95 U.S. 714 (1877) and other decisions. But just as a defendant must be allowed to challenge personal jurisdiction, a defendant can waive it.

Personal jurisdiction is "a legal right protecting the individual" that the defendant may waive. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704, 102 S.Ct. 2099, 2105, 72 L.Ed.2d 492 (1982). As a personal right, "a party may insist that jurisdictional limitations be observed, or may forgo that right, effectively consenting to the court's exercise of adjudicatory authority." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 143 L.Ed.2d 760, 771 119 S.Ct. 1563 (1999). Thus, consistent with long-standing precedent, Hayhurst was free to challenge personal jurisdiction, but was required to do so in the first Rule 12 motion before the district court. Because Rule 12 was violated, Hayhurst waived the right to challenge the judgment on the basis of personal jurisdiction.

B. The Ninth Circuit Ruling Is Consistent With Supreme Court And Ninth Circuit Precedent Regarding Pro Se Litigants

As a *pro se* litigant, Hayhurst was not entitled to relief from the requirements of Rule 12. There is no dispute that judges can give *pro se* litigants some leeway with respect to certain administrative rules. The question here, however, is whether a judge *must* allow a litigant to circumvent the rules in a civil case. Hayhurst cites no authority, and AANP is aware of none, holding that the Rules of Civil Procedure must be overlooked under the facts of this case.

This Court has "never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." *McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 1984, 124 L.Ed.2d 21 (1993). To the contrary, "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826, 65 L.Ed.2d 532, 100 S.Ct. 2486 (1980).

Ninth Circuit precedent similarly requires *pro se* litigants to follow the civil rules, concluding that it cannot "supervise laymen in the practice of law." *Springer v. Best*, 264 F.2d 24, 25 (9th Cir. 1959). The Ninth Circuit explicitly has warned against "becoming a player in the adversary process rather than remaining its referee." *Jacobsen v. Filler*, 790 F.2d 1362, 1365 (9th Cir. 1986) ("It is not for the trial court to inject itself into the adversary process on behalf of one class of litigant."). Accordingly, "a pro se

litigant is not excused from knowing the most basic pleading requirements." *American Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104 (9th Cir. 2000) (citing *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 382 (9th Cir. 1997)). In sum, *pro se* litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record. *Jacobsen*, 790 F.2d at 1364.

Moreover, the Ninth Circuit decision below does not conflict with this Court's ruling in *Haines v. Kerner*, 404 U.S 519, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972). The *pro se* litigant in *Haines* was incarcerated, *id.* at p. 519, a factor that this Court has found compelling when considering whether procedural rules must be followed. *See Houston* v. *Lack*, 487 U.S. 266, 101 L.Ed.2d 245, 108 S.Ct. 2379 (1988). Petitioner Hayhurst is an ordinary civil litigant not entitled to the treatment afforded to inmates.

While *pro se* civil litigants in general need not be given special treatment, Hayhurst in particular was undeserving of such benefits. In the Petition for Certiorari, Hayhurst curiously asserts that the Ninth Circuit "discounted entirely the fact that the Hayhursts were proceeding *pro se*." Petition at p. 9. In fact, the Ninth Circuit expressly recognized the *pro se* status and explained why Hayhurst should not be given special benefits. The Court explained:

> As for the equities in this case, Hayhurst is on thin ice: despite receiving three notices concerning the status of this matter, he resolutely ignored the court and the Association until a judgment had been filed against him; then, when he did appear, he made protestations of

> innocence that were found to be wholly untrue by the district court.

App. 7. The Court further noted that "Hayhurst refused to appear before the magistrate judge" at the evidentiary hearing. App. 9. Even if *pro se* civil litigants should generally be granted leeway under the Civil Rules, Hayhurst's behavior before the district court makes it inappropriate to do so in this case.

C. The Ninth Circuit Properly Applied The Law Regarding The Defendants' Burden In Setting Aside A Default Judgment

Certiorari should not be granted as to whether the Ninth Circuit applied the correct standard for setting aside a default judgment. As Hayhurst observes, this ruling was dictum because it was unnecessary once the Ninth Circuit found personal jurisdiction to have been waived. This Court should not grant certiorari to scrutinize dictum.

Even if this Court were to review the Ninth Circuit's application of the standard for setting aside the default judgment, it would be sustained. In the appeal to the Ninth Circuit, Hayhurst argued improper service and lack of personal jurisdiction. By the time the Ninth Circuit turned to the request to set aside the default under Rule 55(c), it had already dispensed with the questions of jurisdiction and service. Accordingly, the Ninth Circuit was addressing whether the default judgment should be set aside on any other grounds not already addressed in Rule 12. As the court explained, such reasons might include any grounds enumerated in Rule 60(b). App. 9.

When considering those bases, the court need not have addressed personal jurisdiction because it had already found personal jurisdiction to be proper.

Finally, Hayhurst presented no facts that require the default judgment to be set aside under Rule 55(c). The allegedly meritorious defenses raised by Hayhurst were not even facially sufficient. Moreover, Hayhurst contributed to the default by evading service. Under the circumstances, the Ninth Circuit properly followed the precedent set in *In re Hammer*, 940 F.2d 524, 525-26 (9th Cir. 1991).

D. The Ninth Circuit Properly Upheld The Exercise Of Jurisdiction Over Mrs. Hayhurst

As the Ninth Circuit held, Mrs. Hayhurst is in the same situation as her husband with regard to the issues presented on appeal. App. 4 n. 1. Hayhurst misses the point in urging that the complaint is deficient. Mrs. Hayhurst appeared with Mr. Hayhurst in the initial motion seeking dismissal for improper service. In doing so, Mrs. Hayhurst waived personal jurisdiction in exactly the same manner as Mr. Hayhurst. Because the Ninth Circuit found that Mrs. Hayhurst waived personal jurisdiction, this Court should not grant certiorari to analyze the sufficiency of the complaint.

II. EVEN IF THE COURTS BELOW WERE TO REACH THE LONG-ARM QUESTION ON REMAND, THEY WOULD FIND JURISDICTION TO BE PROPER

A finding by this Court that personal jurisdiction was not waived would ultimately be futile. Hayhurst asserts that he merely maintained a passive Internet site accessible in Washington. Relying on *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997), Hayhurst suggests that the court may not exercise personal jurisdiction in such cases. But the Ninth Circuit explained in *Cybersell* that jurisdiction would be proper if there were "something more" in addition to a passive Web site, and if the forum state were the "focal point" of the harm suffered. *Id.* at 418.

The Ninth Circuit subsequently found "something more" in *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998). In *Panavision*, jurisdiction was proper because the registration of an Internet domain name was coupled with an intent to cause a harmful effect within the forum by offering to sell it to the trademark owner. *Id* at 1322.

Under the "effects" doctrine, jurisdiction is reasonable if the defendant's conduct is aimed at or has an effect in the forum state. *Id.* at 1321 (citing cases). Thus, personal jurisdiction can be based on (1) intentional actions; (2) expressly aimed at the forum state; (3) causing harm, the brunt of which is suffered – and which the defendant knows is likely to be suffered – in the forum state. *Core-Vent v. Nobel Indus. AB*, 11 F.3d 1482, 1456 (9th Cir. 1993).

Hayhurst's actions are sufficient to exercise jurisdiction. Hayhurst did not innocently register a domain name that happened to be similar to AANP's. Rather, Hayhurst intentionally adopted a domain name that he knew was identical to AANP's trademark so that Hayhurst could confuse consumers and take business from AANP. Hayhurst had previously known about AANP's business and its trademarks for many years, and had been ordered by another court not to infringe upon AANP's trade name and trademark rights. In view of the lengthy and litigious history between the parties, there is no doubt that Hayhurst intended to cause harm to AANP in Washington, and knew that his actions would in fact do so. Thus, under the effects doctrine, jurisdiction was proper. Because the courts below would ultimately find jurisdiction to be proper on remand, certiorari should be denied.

III. THE QUESTIONS PRESENTED DO NOT HAVE FAR-REACHING IMPLICATIONS

The Ninth Circuit decision is a simple and expected one, holding that the consolidation requirements for motions under Rule 12 apply even after a default judgment is entered. The ruling does not implicate *Pennoyer v. Neff* because defendants are still free to challenge personal jurisdiction so long as they follow long-established procedural requirements when doing so.

Nor is the Court presented with important questions regarding *pro se* litigants. Consistent with long-standing Supreme Court and Ninth Circuit precedent, Hayhurst was required to follow the Federal Rules of Civil Procedure. Though district courts can extend some leeway in

an *appropriate case, considering the* equities of this case it was well within the court's discretion not to do so.

Finally, nothing in the Ninth Circuit decision will encourage plaintiffs to arbitrarily name spouses as defendants. If there is no connection between the spouse and the dispute, spouses remain free to challenge the litigation on any available grounds.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LAWRENCE D. GRAHAM
Counsel of Record
BLACK LOWE & GRAHAM PLLC
816 Second Avenue
Seattle, WA 98104
(206) 381-3300
Attorneys for Respondent American Association of Naturopathic Physicians

DONALD C. HAYHURST
JANE DOE HAYHURST
P.O. Box 96273
Las Vegas, NV 89193
(702) 897-7053

Defendants "Pro Se"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS,	Case No.: C98-1055C
Plaintiff,	**MOTION TO DISMISS**
vs.	
DONALD C. HAYHURST, d/b/a aanp.com and aannp.com; JANE DOE HAYHURST, and AMERICAN ACADEMY OF NATUROPATHIC PHYSICIANS,	
Defendants.	

COMES NOW, Defendant, DONALD C. HAYHURST and JANE DOE HAYHURST, *Pro Se*, who moves the Court pursuant to F.R.Civ.P. Rule - 12(b)(5) and states the following to-wit:

That with respect to this matter Defendants move for dismissal as Plaintiff's have not legally served Defendants as in accordance with Fed.R.Civ.P. - Rule 4(e).

Defendants assert that they were neither served by any form of process serving in this matter, nor, to the best of Defendants knowledge, has there been any publication of service for this matter in Defendants local periodicals. Accordingly, this matter should be dismissed for lack of proper service on Defendants as required by the Federal Rules of Civil Procedure.

WHEREFORE, DEFENDANTS PRAYS:

That the Court after reviewing all papers on file in this matter rules that Service on Defendants was not properly done and accordingly, orders that this matter be dismissed.

Respectfully submitted this 25th day of January, 1999.

/s/ D.C. Hayhurst Pro Se
DONALD C. HAYHURST
JANE DOE HAYHURST
Defendants "Pro Se"
P.O. Box 96273
Las Vegas, NV 89193
(702) 897-7053

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, a non-profit Oregon corporation Plaintiff, vs. DONALD C. HAYHURST, JANE DOE HAYHURST, husband and wife; and AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, a non-profit Nevada corporation, Defendants.	NO. C91-1429Z ORDER GRANTING PLAINTIFF AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICANS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION (Filed Aug. 12, 1992)

THIS MATTER having come on for hearing before the undersigned judge of the above-entitled court, on Plaintiff's Motion for Summary Judgment, and the court having considered: (1) Plaintiff's Motion for Summary Judgment; (2) Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment; (3) the Declaration of John Weeks and Exhibits thereto; (4) the Declaration of Harry F. Swope, N.D.; (5) the Declaration of Carlo Calabrese, N.D. and Exhibits thereto; (6) the Declaration of Mark M. Hough and Exhibits thereto, and; (7) the Response of Defendants, and, no response having been filed, and being fully advised in the premises now does hereby:

ORDER, ADJUDGE AND DECREE that Plaintiff's Motion for Summary Judgment on its claims for Lanham Act Violations, Common Law Unfair Competition, Consumer Protection Act Violations, and trademark and service mark infringement is GRANTED.

It is further ORDERED that defendant corporation, defendant Hayhurst in his capacity as an officer, director or agent of defendant corporation, and their servants, agents, employees, attorneys and all persons in active concert and participation with them, immediately and permanently cease using the name "AANP" or "American Association of Naturopathic Physicians" or any colorable derivation thereof, in any capacity, and that defendant corporation and defendant Hayhurst, and their servants, agents, employees, attorneys and all persons in active concert and participation with them, immediately cease from filing the name "AANP" or "American Association of Naturopathic Physicians," or any colorable derivation thereof, as a corporate name, trade name, or service mark with any governmental agency, and that defendant corporation and defendant Hayhurst, and their servants, agents, employees, attorneys and all persons in active concert and participation with them, destroy all correspondence, letterhead, advertisements, brochures or other materials in the possession of defendant corporation or defendant Hayhurst, or their servants, agents, employees, attorneys and all persons in active concert and participation with them, which may use or carry the name "AANP" or "American Association of Naturopathic Physicians," or any colorable derivation thereof, and that defendant corporation immediately change its corporate name to something other than "American Association of

Naturopathic Physicians" or any colorable derivation thereof in all jurisdictions in which it has used said name.

IT IS FURTHER ORDERED that defendant corporation and defendant Donald Hayhurst pay to plaintiff corporation their costs and attorneys' fees in an amount which will be determined by this court upon application by plaintiff to this court.

Dated this 2nd day of December, 1992.

/s/ Thomas S. Zilly
HONORABLE THOMAS S. ZILLY

Presented by:

REED McCLURE

By Mark M. Hough
Mark M. Hough
David M. Dawson USBA 4578
Of Attorneys For Plaintiff

Whois Query Results

Registrant:
aannp.com AANP3-DOM
8170 S. Eastern Avenue, 4-133
Las Vegas, NV 89123
US

Domain Name: AANP.COM

Administrative Contact:
Hayhurst, Donald C DCH28
don@ANMAAMERICA.COM
(702) 897-7053

Technical Contact, Zone Contact:

Clature, Nomen CN54-ORG nomen@IUINC.COM
610-317-9370

Fax-610-317-9375
Billing Contact:
Hayhurst, Donald C DCH28
don@ANMAAMERICA.COM
(702) 897-7053
Record last updated on 19-Dec-97
Record created on 06-Oct-97.
Database last updated on 24-Jul-98 04:30:41 EDT.

Domain servers in listed order:

WOPR.IUINC.COM 205.147.201.3

DSN.IUINC.COM 205.147.201.4

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS Plaintiff vs. DONALD C. HAYHURST Defendant	)	Case No: _____ Docket No: _____ Dept. No. _____ **AFFIDAVIT OF SERVICE**

I, Edward E. Guttierrez, being first duly sworn, deposes and says: That your affiant is and was on the day he served the within action, a citizen of the United States, over 18 years of age, and not a party to, nor interested in, the within action;

That you affiant received the within SERVICE PACKET W/CERTIFIED COPY OF A TRADEMARK REGISTRATION on the 24 day of APRIL, 1998, and personally served the same upon

DONAD [sic] C. HAYHURST
8170 CREEK WATER LANE
LAS VEGAS, NV 89123

on the 28 day of APRIL, 1998 at 20:48 HRS, with the County of Clark, State of Nevada, with a copy of same.

/s/ Edward Gutierrez
Affiant

Registered Process Server
Nevada State License #289A

EXHIBIT 1

SUBSCRIBED AND SWORN to before me

this 30 day of APRIL, 1998

/s/ Catherine A. Sands
NOTARY PUBLIC in and for the County
of Clark, State of Nevada.

[SEAL]
Notary Public State Of Nevada
Certificate #95-0034-01
CATHERINE A. SANDS
My Appointment Expires
September 7, 19999

SER70

EXHIBIT 10

OUT-OF-TOWN

LEGAL WINGS, INC. SERVE #47734
618 South 6th Street CUSTOMER CHRI7
Las Vegas, NV 89101 384 [illegible] 07/31/98

Ref: AMERICAN
206 682-8100

Date 07/31/98 10:43

Bill To: CHRISTENSEN O'CONNOR JOHNSON
1420 FIFTH AVENUE SUITE 2800
SEATTLE
WA 98101-2347

Case: AMERICAN VS. HAYHURST C98-1055c
Attn:
Document: SUMMONS IN A CIVIL CASE; AND COMPLAINT FOR UNFAIR COMPETITION, TRADEMARK INFRINGEMENT, SERVICE MARK INFRINGEMENT, AND TRADE NAME INFRINGEMENT

Serve: DONALD C. HAYHURST, individually,
AT 8170 Creek Water Ln Las Vegas NV 89123

Windmill to Paradise – South 1st right

Due By: 07/31/98 2400

Date/Time: 00/00/00 By: Rains Alexander [CS]

PROCESS JUL 31 1998

Server Info: 7/31 Address is Mailboxes Etc. 7/31 per Twyla – put on hold til they call w/ new address

8/3 per Twyla – try at 8170 Creekwater Lane Las Vegas NV 89123 8/3/98 AUG 03 1998 7:25p (RA, CW) tt male [sic] through privacy screen door who stated no Hayhurst lives here – no further info – 8/5/98 LM on Twyla V/M to Rt call 8/6 TT Twyla said the person you spoke to was Hayhurst she said to – hold for now will call back w/ instructions
8/11 LM on Twylas V/M to Rt call
8/12 LM on Twyla's V/M to Rt call
8/13 TT Twyla said to hold will call when she get more information

RETURN OF SERVICE

Service of the Summons and Complaint was made by me[1]

DATE 8/13/98

NAME OF SERVER *(PRINT)*
EDWARD E GUTIERREZ

TITLE PROCESS SERVER/INVESTIGATOR

Check on box below to indicate appropriate method of service

[XX] Served personally upon the defendant. Place where served:
8170 CREEKWATER LANE
LAS VEGAS, NV 89123

[ ] Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein. Name of person with whom the summons and complaint were left: _____

[ ] Returned unexecuted: _____

[ ] Other *(specify):* _____

STATEMENT OF SERVICE FEES

[ILLEGIBLE] SERVICES TOTAL

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

---

[1] As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

Executed on 8/13/98
Date

/s/ Edward Gutierrez
Signature of Server

P.O. BOX 4096
LAS VEGAS, NV 89127
Address of Server

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS,	)	Case C98-1055C
	)	May 12, 1999
	)	1:30 p.m.
Plaintiff,	)	
vs.	)	
DONALD C. HAYHURST, et al.,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID E. WILSON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

On Behalf of the Plaintiff: LAWRENCE D. GRAHAM
Attorney at Law

On Behalf of the Defendant: (No One in Attendance)

Caroline R. Castle
Official Court Reporter
(206) 553-1899

Proceedings recorded by mechanical stenography; transcript produced by computer.

* * *

[6] Gutierrez-Direct

A I was an active DEA agent with the Drug Enforcement Agency. And I did some casino security work in Las Vegas, also.

Q I take it that in the course of those duties, from time to time you've been called upon to testify in a court appearance such as this one?

A Yes, I have.

Q Did there come a time, over the course of the past year, when you were asked to serve documents upon the defendant in this case, Mr. Donald Hayhurst?

A Yes.

Q Prior to serving Mr. Hayhurst, had you any familiarity with him at all?

A I had a prior comment by my employer that he had served papers on him four years prior to that with a lot of problems; the reason being that he was very evasive and that he would have P.O. boxes and other places of residence that weren't his.

Q So I take it that you were not familiar with him personally, but you knew of his reputation through another.

A That's correct.

Q Let me ask you, please, to direct your attention to Exhibit 1. It should be the top paper on the stack that's before you bearing a sticker Planintiff's Exhibit No. 1. Do you see that?

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

American Association of Naturopathic Physicians

v. Civil No. 98-126-SM

Donald Hayhurst and American Naturopathic Medical Association

ORDER

(Filed April 1, 1999)

By order of March 4, 1999, defendant Hayhurst was granted ten calendar days to file affidavits and memorandum to attempt to demonstrate the "good cause" showing necessary to set aside an entry of default. Defendant Hayhurst's memorandum and affidavits were filed on March 15, 1999. Plaintiff's opposition was filed on March 23, 1999. The day or so by which each filing is late is forgiven.

Plaintiff seeks to set aside the default under Fed. R. Civ. P. 55(c). While the First Circuit has not adopted a precise formula to determine if there is "good cause" to set aside a default it has recognized some guidelines. *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 503 (1st Cir. 1996). The parties were asked to address these guidelines by affidavit and memorandum.

1. Willfulness of default.

Defendant, in his affidavit, swears that he did not have knowledge of the suit, did no avoid service and was unaware of any process server approaching his home or business. Furthermore, he avers that he was experiencing difficulties at the time of attempted service as a result of a

"mini stroke" and was having trouble reading without a magnifying glass. He also states that when he became aware of the suit he responded promptly. *See* document no. 9 (alleging that he filed his first motion to set aside default on the day he learned of the suit).

Plaintiff's affidavit and in its request for service by publication (document no. 3), set forth a contrary view. Plaintiff's counsel contacted defendant's counsel of record requesting acceptance of service. Defendant's counsel reported back that defendant refused to authorize acceptance of service. Plaintiff, on March 30, 1998, forwarded the Complaint, Notice of Lawsuit, and Request for a Waiver of Service to defendant by first class U.S. certified mail. The return receipt was signed but the letter was refused. A Nevada Constable was asked to make service at addresses previously supplied by defendant. The 3163 S. Eastern Avenue address turned out to be a vacant building. The 8170 Eastern Ave. address was a P.O. Box at "Mail Boxes, Etc." The given telephone numbers were a message taking answering service. Calls were not returned. The 8170 Creekwater Lane address visit by the Constable was responded to by a female who denied that the defendant lived at that address. The initial motion for default or for service by publication was mailed to defendant by certified mail on June 29, 1998. Service was made by publication. Additionally, on July 2, 1998 a web site announcement of the suit showed a posted response including the statement that "(n)either Dr. Hayhurst nor ANMA is aware of this lawsuit." Finally, plaintiff states, but has not substantiated with any attached pleadings (contrary to its memorandum statement) that the "traumatic health problem" claim is not new.

This court's records in *Donald C. Hayhurst, N.M.D. v. Robert Timberlake, et al.*, C-94-199-SD show that Hayhurst availed himself of this court's jurisdiction, lost on summary judgment, had his appeal thrown out by informal mandate and has an unsatisfied order of outstanding fees and costs of $11,342.92 against him. With an outstanding judgment against him he has reason to avoid this jurisdiction.

The evidence establishes an intentional pattern of avoiding service of process. Evasion of service of process however does not establish a willful default. The only evidence on the issue of willful default is that defendant did not appear in response to publication but he did respond within twenty days of the mailing to him of plaintiff's motion for default. In the absence of any evidence that defendant acquired actual knowledge of service by publication, the relatively prompt response to the motion for default belies a willful default.

2. Prejudice.

The prejudice which plaintiff alleges is the extraordinary cost and time delay caused by defendant's evasion of service of process. However, "(t)he issue is not mere delay, but rather its accompanying dangers: loss of evidence, increased difficulties of discovery, or an enhanced opportunity for fraud or collusion." *Federal Deposit Insurance Corporation v. Francisco Investment Corporation*, 873 F.2d 474, 479 (1st Cir. 1989). Plaintiff has failed to establish any evidence of these accompanying dangers.

3. Defendant's Explanation.

Defendant is not credible as to his assertions that he was unaware that plaintiff was attempting to make service. He is also not credible as to his claims of inadequate eyesight in view of the numerous and detailed pleadings he has filed and his acknowledged extensive internet activities. He is credible as to his lack of knowledge of service of process since he is not a fool and would not allow a default judgment of seven figures to occur.

4. Good faith.

Defendant's evasion of service of process, his litigious history, his unjustified request for a seven month extension to answer and his failure to pay the judgment against him in a suit he brought) [sic] lead me to conclude that he is not acting in good faith. He appears to be delaying. He also claims to be unable to pay the existing $11,000 judgment while claiming to be concerned about the sizeable judgment sought here.

5. Timing.

The motion(s) was (were) filed promptly.

6. Amount Involved.

Plaintiff is seeking a judgment in excess of $1,000,000.00. Whether defendant is judgment-proof or not, the size of the sum sought is such that it ought to be earned on the merits, not by default.

7. Meritorious Defense.

In view of defendant's prior lost claim in this court and his frivolous appeal of the judgment against him, the

defense asserted here may be viewed with skepticism. However, he has fully answered and has vigorously denied plaintiff's allegations. If true, his answers would be a defense. On the present pleadings no determination can be made as to the actual, as opposed to the possible, merit of defendant's defense. On its face the answer establishes a meritorious defense.

Balancing all of the facts, particularly as they relate to willfulness, prejudice and the merits of the defense, I find defendant Hayhurst has shown good cause to vacate the default. The motion (document no. 27) is granted. The damages hearing scheduled for April 14, 1999 is canceled.

SO ORDERED.

/s/ James R. Muirhead
James R. Muirhead
United States Magistrate Judge

Date: April 1, 1999

cc: Robert A. Backus, Esq.
Donald C. Hayhurst, *pro se*
Linda A. Theroux, Esq.